Supreme Court, U.S.
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DOCKET NO.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

In Re: USAir, Inc.

ON PETITION FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

PETITION FOR WRIT OF PROHIBITION

Mark A. Dombroff, Esquire
(Counsel of Record)
Thomas B. Almy, Esquire
Mark E. McKinnon, Esquire
DOMBROFF & GILMORE
2828 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20007
Tel. (202) 965-6100

Counsel for Petitioner USAir, Inc.

CASILLAS PRESS INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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QUESTION PRESENTED FOR REVIEW

1. Whether the courts below judicially usurped power statutorily reserved to the Federal Aviation Administration ("FAA") in holding disclosure of internal airline safety audits would not disrupt the free flow of safety information, where the FAA has made an explicit finding to the contrary.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

This petition arises from multi-district litigation 1041, which is a consolidation of all lawsuits stemming from the crash of USAir Flight 1016. The following are the parties to the suits comprising MDL 1041.

A. Plaintiffs

Bowles, Brenda
Bowles, Christopher
Brown, Tywonda
Cain, Tamberly R.
Cain, Winton R.
Calvo, Paul
Cantey, Bertha
Corbin, Rahsaan
Crosby, James
Demery, Rich
Dixon, Elaine
Dixon, Wendell
Doucette, Dorian
Doucette, Dante Deon
Doucette, Floyd
Doucette, Gracie
Doucette, Dorian
Doucette, Dorian
Echevarria, Youkana Maria
Epps, Corine
Erwin, Mark
Fant, James
Forcht, Karen
Gibbon, Jr; Carlos W.
Gray, James
Gray, Rita
Greenlee, Michael R.

Hamilton, Inge S.
Hamilton, Roger
Hayes, James
Jackson, Hester
Jeter, Charles L.
Jeter, Elizabeth
Jeter, Charnesha L.
Jeter, Patrice C.
Johnson, Caldwell
Johnson, Robert I.
Jontz, Billie Louise Gaines
Jontz, William M
Jontz, William G.
Litchfield, John
Litchfield, Theresa Marie
London, Danasia
London, Johnavon K.
Markwith, Shelly
Mattox, Steve
Melton, James
Morgan, Richard L.
Nicole, Ka Brea
Norris, Joseph Alexander
Norris, Linda L.
Perez, Paul Flores
Peters, Christine
Phillips, Joseph A.
Plowden, Brittany Rochelle
Price, Jerome J.
Price, Patricia A.
Price, Ryan
Price, Shawn
Price, Thelma
Seymour, Debra

Sharkey, Angela
Sharkey, Edward
Stephenson, Charlie
Sturkie, Freddie Sue
Sturkie, Jason
Sturkie, Rex
Welch, Mildred L.
White, Corey
Williams, Lori
Williams, Stanley
Willingham, Ron
Young, Adisa T.
Young, Deborah

B. Defendants

Federal Aviation Administration
Honeywell Corporation
McDonnell Douglas Corporation
Scofield, Seth
USAir Group
USAir Incorporated
The United States of America

C. Parent Companies and Subsidiaries of Petitioner USAir, Inc.

Parent Company, USAir Group, Inc.

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ON PETITION FOR WRIT OF PROHIBITION
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FOR THE DISTRICT OF SOUTH CAROLINA

PETITION FOR WRIT OF PROHIBITION

I. STATEMENT OF JURISDICTION, NAME AND OFFICE OF PERSON AGAINST WHOM RELIEF IS SOUGHT AND STATEMENT OF WHY RELIEF IS UNAVAILABLE WITH ANY OTHER COURT

Petitioners seek relief from an order entered by Judge Joseph F. Anderson, Jr., sitting on the United States District Court for the District of South Carolina pursuant to the All Writs Act, 28 U.S.C. § 1651(a).

Petitioner has exhausted all potential remedies available from the court below. Petitioner sought reconsideration of the order from the District Court, which was denied. Petitioner then filed a petition for Writ of Prohibition with the United States Court for the Fourth Circuit, which ordered additional briefing and heard oral argument. The petition was denied on May 2, 1996. Petitioner requested rehearing or in the alternative rehearing en banc, which was denied on July 3, 1996.

II. STATEMENT OF NOTIFICATION PURSUANT TO RULE 29(4)(A)

A copy of the foregoing petition for Writ of Prohibition was served pursuant to Supreme Court Rule 29(4)(a) upon the Solicitor General at the following address:

Solicitor General of the United States
Room 5614
Department of Justice
10 St. & Constitution Ave., NW
Washington D.C. 20530

III. STATEMENT OF THE CASE AND FACTS NECESSARY FOR REVIEW

This Petition arises out of Multidistrict Litigation 1041, *In Re Aircrash at Charlotte, North Carolina on July 2, 1994*, a consolidation of the suits filed in the wake of the crash of USAir Flight 1016, and involves the possible disclosure of documents prepared by or on behalf of USAir in the course of purely voluntary self-examinations by USAir for *internal* use by USAir only.[1]

On October 26, 1995, Judge Joseph F. Anderson, Jr. ordered production by USAir of certain internal audit documents. In doing so, the court found that the self-critical evaluation privilege did not protect the documents, because, in his opinion, disclosure of voluntary, internal safety audits by an airline would not curtail the free flow of safety related evaluations

[1]USAir produced, without objection, all inspections of itself conducted by the Federal Aviation Administration and the Department of Defense.

within the company, and therefore the documents failed to meet the third prong of the self-critical evaluation privilege test.[2]

On May 2, 1996, the Fourth Circuit issued an Order denying USAir's petition for Writ of Prohibition. The Court ruled, *inter alia*, that the District Court's findings did not constitute an abuse of discretion or judicial usurpation of power. On May 29, 1996, the District Court ruled that it would keep the stay of the disputed discovery order in place pending resolution of the matter by the Fourth Circuit. Petitioner subsequently filed a Petition for Rehearing with Suggestion for Rehearing En Banc, which was denied on July 3, 1996.

IV. ARGUMENT

The Order from the District Court requiring production of USAir's internal safety audits is in direct conflict with the statutorily mandated factual finding by the Federal Aviation

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[2]Under the Self-Critical Evaluation privilege, an internal document candidly assessing safety or compliance with regulatory or legal requirements is protected from discovery when:

1. The information to be shielded from discovery results from a critical self-analysis undertaken by the party seeking protection,
2. The public has a strong interest in preserving the free flow of the type of information sought,
3. The information is of the type whose flow would be curtailed if discovery were allowed.

Peterson v. Chesapeake & Ohio Railway, 112 F.R.D 360 (W.D. Mich. 1986); *see also Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971); *New York Stock Exchange v. Sloan*, 22 Fed.R.Serv.2d 500 (S.D.N.Y. 1980); *In re Crazy Eddie Securities Litigation*, 792 F.Supp. 197 (E.D.N.Y. 1992); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Granger v. National RR. Corp.*, 116 F.R.D. 507 (E.D.Pa.1977); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977).

Administration ("FAA") that requiring disclosure of self-critical reviews will, in fact, harm public safety by deterring airlines from conducting internal audits and in reducing their effectiveness. At no time below have any arguments been made challenging the validity or basis for the FAA's finding. In the absence of such a challenge, the court's substitution of its own judgment for that of the FAA constitutes a judicial usurpation of agency power.

A. THE RULING OF THE COURTS BELOW CONSTITUTE A JUDICIAL USURPATION OF FAA AUTHORITY AND WITHOUT IMMEDIATE ACTION BY THE COURT, PETITIONERS RIGHTS WILL BE IRRETRIEVABLY LOST

Under the All Writs Act, this Court has the power to issue "all writs necessary or appropriate in aid of . . . [its] jurisdiction." 28 U.S.C. § 1651(a). "Historically, mandamus has been considered a proper remedy for interlocutory review in cases where the district court clearly abused its discretion or usurped and misapplied federal judicial power." *In re Virginia Electric and Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976). Recently, however, "federal courts with the Supreme Court's approval, have come to appreciate the usefulness and flexibility of mandamus in other, less extreme, situations." *Id.* Mandamus and prohibition have emerged as "an appropriate remedy in the supervision of district courts by the various courts of appeals. *Id.; Labuy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 109 (1967).

While the issuance of a writ of mandamus or prohibition is an extraordinary remedy, it is appropriate where there has been a judicial usurpation of authority and the "wrong . . . otherwise can never be effectively presented on appeal," or

the petitioner's rights will be irretrievably lost if the petition is not granted. *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 (1976); *In Re Grand Jury Subpoenas*, 581 F.2d 1103 (4th Cir. 1978), *cert. denied sub nom Fairchild Indus. v. Harvey*, 440 U.S. 971 (1979). The District Court's error in ordering the production of the documents in question meets both of these mandamus criterion.

The order by the District Court is in direct conflict with factual findings made by the FAA pursuant to 5 U.S.C. §552(b)(4) concerning the impact on public safety by disclosure of such documents. By substituting its own judgment for that of the FAA on matters of airline safety and public policy, where the FAA's judgment has not come into question, the District Court usurps power specifically delegated to the FAA by Congress pursuant to 49 U.S.C. § 40101. *See e.g. United States v. Carrigan*, 804 F.2d 599, 604 (10th Cir. 1986); *In Re EEOC*, 709 F.2d 392, 394-95, 401 (5th Cir. 1983); *Arnold v. Blast Intermediate Unit 17*, 843 F.2d 122, 125 (3d Cir. 1988); *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Moreover, it will not be possible for these important issues to be addressed through appeal after trial on the merits, as disclosure of the documents to the plaintiffs will destroy the privilege, rendering the issue moot. *In Re Steinhardt Partners*, 9 F.3d 230, 232 (2d Cir. 1993). This matter is, therefore, appropriate for resolution through issuance of an extraordinary writ.

1. THE RULING OF THE COURTS BELOW CONSTITUTE A JUDICIAL USURPATION OF FAA AUTHORITY

In denying USAir's Petition for Writ of Prohibition, the Fourth Circuit held that the District Court's finding that USAir's internal safety audits would not fall within the self-critical evaluation privilege was not a judicial usurpation of authority. The Appellate Court's Order, however, makes no finding as to the validity of the Advisory Circular, and the record is devoid of any argument or facts contesting the validity or applicability of the FAA's findings of fact and public policy contained in Advisory Circular 120-56.[3] In the absence of any challenge to the validity of the FAA's findings, it is a usurpation of agency authority for the court to ignore these findings and substitute its own judgment, as has been done here.

Pursuant to 49 U.S.C. § 40101, Congress delegated to the FAA the sole authority to regulate all aspects of air travel. Congress instructed the FAA to strike a balance between the competing objectives of promoting safety, "placing maximum reliance on competitive market forces," encouraging air carriers to earn "adequate profits", providing air service to both urban and rural areas, strengthening U.S. carriers competitive advantage against foreign carriers, and creating a system responsive to the needs of general commerce and national defense. *See* 49 U.S.C. § 40101 (1995). Just such a balancing of interests was conducted by the FAA in its promulgation of Advisory Circular 120-56, which is aimed primarily at increasing airline safety.

---

[3]While the District Court did not have the findings of the FAA in Advisory Circular 120-56 before it in rendering its initial decision, the Fourth Circuit did consider arguments concerning the impact of AC 120-56 in ruling that the District Court's Actions do not constitute a judical usurpation of authority.

In Advisory Circular 120-56, the FAA states that "[a]ir carriers are encouraged, but not required, to develop Internal Evaluation Programs that continually monitor company policies and procedures and ensure that the highest level of safety compliance is maintained." The FAA noted, however, that there is a tremendous disincentive against carriers which act responsibly and attempt to uncover and report any deficiencies because they could then be subject to civil penalties. "The FAA's enforcement program has always been considered a means, not an end, to achieving compliance with the FAR through remedial and punitive measures. However, the negative incentive of deterrence, as served by civil penalties, is not always effective. The public interest is served also by positive incentives to promote and achieve compliance. Indeed, the FAA believes that aviation safety is well served by incentives to certificate holders to identify and correct their own instances of noncompliance by investing more resources in efforts to preclude their recurrence." *See Advisory Circular* 120-56 attached to USAir's Petition as Appendix D.

It was these exact concerns that motivated this Court to recognize the social worker and psychiatrist-patient privilege in *Jaffee v. Redmond,* 1996 WL 315841 (June 13, 1996). In order for a critical self-audit to be effective, the participants must be able to operate in an atmosphere of confidence and trust in which each person is willing to make a frank and complete disclosure of all those things that may have a detrimental impact on airline procedures and safety. *Compare, Jaffee* at 4-8. The mere risk that the concerns expressed by an employee will not be held confidential, and that in fact the participant may be used by a plaintiff as the next "star witness" against his employer, destroys the atmosphere of confidence and candor, destroying the effectiveness of such reviews.

In fact, the FAA felt so strongly about the importance of this information and the potential chilling effect public disclosure would have on the airlines, that they exempted such information from the Freedom of Information Act. Under normal circumstances, any disclosure made by an airline would be available to the public pursuant to the Freedom of Information Act, 5 U.S.C. § 552. In order to exempt such information from the scope of FOIA, the FAA must make a determination that disclosure would "(1) *impair the Government's ability to collect similar information in the future,* or (2) cause harm to an identifiable governmental interest." 5 U.S.C. § 552(b)(4). In Advisory Circular 120-56, the FAA specifically determined that both of these tests were met. *See Advisory Circular* 120-56 at 7-8. The FAA's stated concern over the impact of disclosure on the safety of the thousands of Americans who fly daily raises these concerns to the level of a public interest which should be protected, especially in light of the fact that audits of USAir by the FAA and Department of Defense are already available to the Plaintiffs.

When there has been a factual finding by an administrative agency of competent jurisdiction over the relevant subject matter, a court is not free to ignore such a ruling and substitute its own judgment for that of the agency. *Cellular Mobile Systems of Pennsylvania, Inc. v. Federal Communication Commission,* 782 F.2d 182 (D.C. Cir. 1985). Rather, the court must defer to that finding unless the court first finds that the agency's action was "arbitrary, capricious, or unsupported" by the record. *Id.* Moreover, the court "will not substitute its judgment on highly technical and factual matters for that of the agency charged with supervision of the industry." *Id., quoting Community Nutrition Inst. v. Novitch,* 773 F.2d 1356, 1363 (D.C. Cir. 1985); *see also Federal Communications Commission v. Schreiber,* 381 U.S. 279 (1965).

In affirming the District Court's decision, the Fourth Circuit, which heard substantial arguments concerning Advisory Circular 120-56, never ruled that the findings contained in Advisory Circular 120-56 constitute either an abuse of discretion by the FAA or are unsupported by substantial evidence. Moreover, at no time has any party to the litigation challenged the validity of the Advisory Circular. In the absence of any claim or evidence that the Advisory Circular's findings are invalid, it is a usurpation of power for the courts below to substitute their own judgment for that of the FAA on the public policy and safety implications of forcing disclosure of voluntary internal safety audits. The courts have put themselves squarely in conflict with the standard of proper deference to be accorded statutorily mandated agency actions set forth by this Court and the Circuits.

This is especially true since the FAA has been charged by Congress with balancing the competing interests of safety, competitiveness, convenience, and cost to the air travelling public. When the courts substitute their own judgment for that of the agency on the narrow facts before it, these other concerns are not adequately represented or considered. Such a substitution of judgment could easily have unintended consequences that affect other parts of the air transport system, destroying the balance sought by Congress. Accordingly, this Court should reject the improper judicial usurpation of power delegated to the FAA and grant the requested petition for writ of prohibition.

2. WITHOUT IMMEDIATE ACTION BY THE COURT, PETITIONERS RIGHTS WILL BE IRRETRIEVABLY LOST

If this Court denies the instant Petition, the Petitioner will be forced to disclose the contested documents to the Plaintiffs. Such disclosure of these documents, not to mention their

possible use at trial, will destroy any privilege that USAir might possess over the documents. "In fact, the concern that a remedy after final judgment cannot unsay the confidential information that has been revealed may account for the liberal use of mandamus in situations involving the production of documents or testimony claimed to be privileged or covered by other more general interests in secrecy." *Von Bulow v. Von Bulow*, 828 F.2d 94, 99 (2d Cir. 1987). Not only would this leave USAir without any adequate remedy, some Circuits have indicated that the public disclosure irrevocably destroys the privilege rendering the issue moot. *In Re Steinhardt Partners*, 9 F.3d 230, 232 (2d Cir. 1993). The serious implications for public policy and airline safety arising from the District Court's Order to disclose internal audits would, therefore, never be subject to review. It would therefore be appropriate for this Court to hear this matter.

B. CONCLUSION

Wherefore USAir requests that this Court issue an Order granting USAir's Petition for Writ of Prohibition and preventing disclosure of the contested documents.

Respectfully submitted,
DOMBROFF & GILMORE

/s/ _____

Mark A. Dombroff, Esquire
(Counsel of Record)
Thomas B. Almy, Esquire
Mark E. McKinnon, Esquire
2828 Pennsylvania Avenue, N.W.
Suite 400
Washington, DC 20007
Tel. (202) 965-6100

Counsel for Petitioner USAir, Inc.

APPENDIX A

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LARRY W. PROPES
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COLUMBIA, S.C.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

MDL DOCKET NO. 1041

IN RE AIR CRASH AT
CHARLOTTE, NORTH CAROLINA
ON JULY 2, 1994

JOSEPH F. ANDERSON, JR.
JUDGE

ORDER

This matter is before the court upon plaintiffs' motion to compel production from defendant U.S. Air, Inc. ("U.S. Air"). U.S. Air asserts a variety of privileges regarding the documents in dispute. Oral argument was heard on the request on September 19, 1995. At the conclusion of the argument, the court took the matter under advisement and directed defendant to furnish the court with a privilege log. Additional argument was heard by way of a telephone conference call on October 5, at which the court directed defendants to file all of the disputed documents with the court for its *in camera* review. The court then received additional briefing on the various privileges that had been asserted and conducted a final telephone conference call on October 19, 1995. For the reasons which follow, the motion to compel is granted in part and denied in part.

At issue in this motion are sixty-two documents prepared by, or at the request of, defendant U.S. Air. As set out in detail in the privilege log on file with the clerk in this case, U.S. Air contends that all sixty-two documents are protected by one or more of three privileges: the attorney-client privilege, the work-product privilege, and the self-critical evaluation privilege. As to most of the documents, more than one privilege is asserted.

Federal Rule of Evidence 501 provides that where an action is governed by federal law, issues of privilege are determined in accordance with federal common law. Where, however, as here, the matter before the court is based upon diversity of citizenship, "the privilege . . . shall be determined in accordance with state law." Fed. R. Evid. 501. The parties agree on the relevant law of attorney-client and work-product privilege. With regard to the work-product privilege, however, plaintiffs contend that U.S. Air waived the privilege when it signed a document agreeing to cooperate with National Transportation Safety Board ("NTSB") investigators assigned to investigate the crash in dispute in this litigation. The court has reviewed the text of the waiver executed by U.S. Air in connection with the NTSB investigation and has determined that it does not waive the work-product privilege asserted in this case, at least as to the documents in dispute.

As noted above, both parties agree on the substantive law of attorney-client and work-product privilege. Thus, for the documents for which one or both of these privileges is asserted, the court's task has been limited to a review of the documents to determine if they fall within the protection of either privilege. After its initial review of the documents, the court determined that it had sufficient information to determine the applicability of these two privileges as to all documents except for documents sixty-one and sixty-two. It appeared, upon this court's cursory review of the documents,

that they contained little more than data-compilations, charts, and graphs. At the final conference call on October 19, 1995, counsel for U.S. Air assured the court that these compilations were calculations made at the request of counsel, in preparation for litigation. Counsel further assured the court that plaintiffs have been provided with the raw data upon which the calculations were made.

After receiving this information, the court now concludes that all documents except for documents 3, 4, 5, 20, 21, and 28 are protected by either the attorney-client or work-product privilege, or both. Accordingly, the court will deny the request for production with respect to these documents. The court will require these documents to remain filed with the clerk, under seal, so they will be available to the Court of Appeals in the event of an appeal after trial in this case.

The remaining documents (Numbers 3, 4, 5, 20, 21, and 28) are more problematic. As to these documents, U.S. Air asserts only the so-called self-critical evaluation privilege. In marked contrast to the position of the parties with regard to the substantive law of the other two privileges, U.S. Air and plaintiffs take widely-divergent positions on the question of which state law should govern the privilege issue and, secondarily, whether any jurisdiction whose laws potentially apply to this litigation recognizes the self-critical evaluation privilege.

U.S. Air contends that the law of South Carolina, the forum state for all cases that have originated in South Carolina or have been transferred here for consolidated pretrial proceedings by the multi-district litigation panel, should govern the privilege issue. Plaintiffs contend, on the other hand, that because this court will be required to apply the law of the state of North Carolina (the place where the plane crash in question

occurred) the court should look to the law of North Carolina to determine whether a self-critical evaluation privilege should be recognized and applied to the six documents in dispute.

The court, however, finds it unnecessary to decide the troublesome issue of which state's law should apply, or, alternatively, to what extent the law of either North Carolina or South Carolina would recognize the self-critical evaluation privilege. The court's review of the documents for which this privilege is asserted yields the conclusion that even if the relevant state recognized the self-critical evaluation privilege such a privilege would not apply under the circumstances presented here.

As pointed out by plaintiffs in their memorandum of law, the self-critical evaluation privilege is a privilege of recent origin and one that is narrowly applied even in those jurisdictions where it is recognized. As noted by the Ninth Circuit Court of Appeals "The Supreme Court and the circuit courts have neither definitely denied the existence of such a privilege, nor accepted it and defined its scope. Rather, when confronted with a claim of the privilege, they have refused on narrow grounds to apply it to the facts before them. . . ." *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 427 fn 1 (9th Cir. 1992). The *Dowling* court explained:

> [O]ther courts have generally required that the party asserting the privilege demonstrate that the material to be protected satisfies at least three criteria: 'first, the information must result from a critical self-analysis undertaken by the party seeking protection; second the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.' Note, The privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083, 1086 (1983). To these

> requirements should be added the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential. See James F. Flanagan, Rejecting a General Privilege for Self-Critical Analyses, 51 Geo. Wash. L. Rev. 551, 574-576 (1983). . . .

Id. at 425-426.

In *Dowling* the court refused to apply the privilege to protect voluntary routine pre-accident safety reviews undertaken by a cruise ship operator which may have disclosed that the defendant had knowledge of the dangers which resulted in an injury to the plaintiff in a Jones Act case. The court found that such reviews will rarely, if ever, be curtailed simply because they may be the subject of discovery. The court held that such reviews are not always performed with the expectation that they will be kept confidential. Rather, the discovery sought was of signal importance:

> [T]hat information may reveal not only what the company knew of the condition, but whether it regarded it as dangerous, whether it assigned someone to repair the condition, what that person did, whether the company typically responded swiftly and effectively to hazardous conditions or allowed them to persist, and so on. . . . A rule that manufacturers' reviews of the safety of their products are privileged from discovery would place a nearly insurmountable barrier in front of plaintiffs who must prove malice in order to obtain punitive damages in product liability actions. . . . It would also create an enormous obstacle to claims that a manufacturer fraudently concealed its knowledge of the health hazards of its products.

971 F.2d at 427.

Where recognized, the self-critical evaluation privilege does not shield objective facts from discovery. *See e.g., Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522, 526 (N.D. Fla. 1994); *Webb v. Westinghouse Elec. Co.*, 81 F.R.D. 431, 434 (E.D. Pa. 1981). The self-critical evaluation privilege has been rejected where the information is sought by a governmental agency. *E.g., F.T.C. v. TRW, Inc.*, 628 F.2d 207, 220 (D.C. Cir. 1980). Furthermore, information otherwise subject to the privilege "must be disclosed whenever it is material to the adversary's case, and where the information therein cannot be obtained through alternative sources." Federal Rules of Evidence Manual, Vol. 2, p. 637 (6th Ed. 1994).

Applying the foregoing principles to the six documents for which U.S. Air seeks to assert this privilege, the court has concluded that the documents in dispute do not meet the requirements of the privilege. The most significant stumbling block for U.S. Air is the third factor identified by the court in *Dowling, supra*: the proponent of the privilege must demonstrate that the information is of the type whose flow would be curtailed if discovery were allowed.

It is beyond dispute that the airline industry is highly competitive and tightly regulated. Moreover, all airlines have a keen interest in advancing and promoting safety as well as improving service. Airlines are, therefore, likely to conduct internal audits from time to time to insure improved efficiency (both in terms of service and economy), safety and marketability. While disclosure of these audits and other papers to competitors of U.S. Air would certainly deter use of them in the future, disclosure for limited use in litigation (such as to prove notice) is unlikely to deter their use.

In addition to these broad reasons for not applying the self-critical evaluation privilege to the six documents in dispute,

other more specialized reasons exist. For example, with regard to the select review panel report (Document #3) certain "acknowledgements" within the documents suggest that much of this information, if not the entire report, may have been gleaned from or shared with outsiders. Moreover, the "tone" of this document seems to be more oriented towards public relations than a candid self-critical analysis. For these reasons, disclosure of the documents in discovery, subject to a strict protective order, is unlikely to deter preparation of a similar document in the future.

With regard to the documents relating to the Phaneuf audit (Documents 4, 5, 20, & 21) it appears that the report itself was made in anticipation of a national aviation safety inspection by the Federal Aviation Administration (FAA). Given its purpose of helping the airline comply with FAA regulations, limited disclosure of the report, and documents relating to it, is unlikely to deter preparation of similar reports in the future. With regard to the U.S. Air internal white glove audit (Document #28) certain passages in the document itself indicate that U.S. Air discussed turning the audit over to the FAA.

For all of the foregoing reasons, the court has concluded that Documents 3, 4, 5, 20, 21, & 28 would not be protected by a self-critical evaluation privilege even if one were recognized by the appropriate jurisdiction. Therefore, assuming, without deciding, that such a privilege should apply in this case, the court determines that the six documents listed in this paragraph are not protected by the privilege.

Defendant also has pending two motions for protective order relating to the deposition of Captain Timothy Ludwig. The first motion, filed October 16, 1995, seeks to protect from disclosure a conversation between Ludwig and another witness which occurred in counsel's offices during a break in deposition preparation. Counsel was not, however, a party to the

conversation. The court finds that attorney-client privilege cannot be asserted under these circumstances. Plaintiff's witnesses must respond to these questions. The second or "supplemental" motion, filed October 25, 1995 addresses this conversation as well as various communications with counsel. The latter does appear to be protected by the attorney-client privilege and need not be disclosed.

This ruling shall be binding in future depositions of other witnesses as to the specific conversations and events covered in defendant's memorandum and by this order. Therefore, no new Local Rule 10.04(C) motion need be made after directing a witness not to answer such inquiries to the extent the asserted privilege is covered by this order.

CONCLUSION

For the foregoing reasons, U.S. Air shall produce Documents 3, 4, 5, 20, 21, & 28 to plaintiffs within ten (10) days from the date of this order. The remaining documents are all protected by either the attorney-client or the work-product privilege and need not be produced. Captain Ludwig shall respond to the inquiries related to his conversation with another witness outside counsel's presence.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.

Joseph F. Anderson, Jr.
United States District Judge

October 25, 1995
Columbia, South Carolina

APPENDIX B

May 2, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3156

In Re: USAIR, INC.

Petitioner.

ORDER

USAIR, Inc. filed a petition for a writ of prohibition to have us review the district court's discovery order requiring USAir to produce documents numbered 3, 4, 5, 20, 21, and 28, subject to a protective order. In response to USAir's assertion of a self-critical evaluation privilege, the district court "Assum[ed], without deciding, that such a privilege should apply in this case" but "concluded that Documents 3, 4, 5, 20, 21, & 28 would not be protected by a self-critical evaluation privilege even if one were recognized by the appropriate jurisdiction."

Having carefully reviewed the record and received the arguments of the parties and the *amicus curiae* we conclude that the district court did not clearly abuse its discretion or usurp judicial power in entering the challenged discovery order. *Cf. Mallard v. United States Dist. Court*, 490 U.S. 296 309 (1989). Accordingly, USAir's petition is denied.

In so deciding, we express neither approval nor disapproval of the self-critical evaluation privilege.

Entered on the direction of Judge Niemeyer with the concurrence of Judge Russell and Judge Ervin.

For the Court,
/s/ Bert M. Montague

Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 3, 1996

No. 95-3156
CA-95-1041

In Re: USAIR, INCORPORATED
Petitioner

On Petition for Rehearing with
Suggestion for Rehearing In Banc

USAir's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

APPENDIX D

Advisory Circular
U.S. Department of Transportation
Federal Aviation Administration

Subject: AIR CARRIER VOLUNTARY DISCLOSURE REPORTING PROCEDURES

Date: 1/23/92 AC No: 120-56
Initiated by: AFS-200 Change:

1. *PURPOSE.*

a. This advisory ciruclar (AC) provides information and guidance material that may be used by air carrier certificate holders operating under Federal Aviation Regulations (FAR) Parts 121 and 135 when electing to voluntarily disclose apparent violations to the Federal Aviation Administration (FAA). The procedures and practices outlined in this AC can be applied to maintenance, flight operations, and security aspects of an air carrier's organization. Voluntary disclosure procedures for certificate holders other than those operating under FAR Parts 121 and 135 may be issued separately in the future.

b. Air carriers are encouraged, but not required, to develop Internal Evaluation Programs that continually monitor company policies and procedures and ensure that the highest level of safety compliance is maintained. However, operators may voluntarily disclose apparent violations in accordance with the procedures set forth in this AC even if an Internal Evaluation Program has not been established. Certificate holders seeking guidance on Internal Evaluation Programs should refer to advisory materials on the subject for further information.

2. *BACKGROUND.* The FAA's enforcement program has always been considered a means, not an end, to achieving compliance with the FAR through remedial and punitive measures. However, the negative incentive of deterrence, as served by civil penalties, is not always effective. The public interest is served also by positive incentives to promote and achieve compliance. Indeed, the FAA believes that aviation safety is well served by incentives to certificate holders to identify and correct their own instances of noncompliance by investing more resources in efforts to preclude their recurrence. The FAA's newly adopted policy of foregoing civil penalty actions when a certificate holder detects violations, promptly discloses violatins to the FAA, and takes prompt corrective action to ensure that the same or similar violations do not recur, is designed to encourage compliance with the FAR, foster safe operating practices, and promote the development of Internal Evaluation Programs.

3. *KEY TERMS.* The following key terms and phrases are defined to ensure a standard interpretation and understanding of the FAA's voluntary disclosure policy.

a. *Evidence.* For the purpose of voluntary disclosure, evidence generally should be in the form of written documentation or reports that support an air carrier's analysis of the disclosed apparent violation and the resulting elements of the proposed comprehensive fix. Evidence generally comes from the following four elements:

(1) Documents or manuals reviewed
(2) Equipment examined.
(3) Activities observed.
(4) Interview data.

b. *Comprehensive Fix.*

(1) A comprehensive fix is an action, or actions, proposed by the certificate holder, acceptable to the principal in-

spector, to preclude recurrence of the apparent violation that has been voluntarily disclosed under this program.

(2) A schedule of the dates and events encompassed by the comprehensive fix must be established and included in the letter of correction.

c. *Satisfactory Fix.* A satisfactory fix is a comprehensive fix in which all corrective measures recommended by the certificate holder have been completed in a predetermined period of time and to the satisfaction of the FAA.

4. *VOLUNTARY DISCLOSURE POLICY.* The FAA believes that the open sharing of apparent violations and a cooperative as well as an advisory approach to solving problems will enhance and promote aviation safety. Certificate holders will receive a letter of correction in lieu of civil penalty action for instances of noncompliance that are voluntarily disclosed to the FAA in accordance with the procedures set forth in this AC. Once the letter of correction is issued, the case will be considered closed unless the agreed upon comprehensive fix is not satisfactorily completed by the certificate holder.

a. In evaluating enforcement action for a certificate holder's actual or apparent failure to comply with FAA regulations, the FAA will ensure that the following five conditions are met:

(1) The certificate holder immediately notified the FAA of the apparent violation after detecting it and before the agency learned of it.

(2) The apparent violation must have been inadvertent.

(3) The apparent violation does not indicate a lack, or reasonable question, of basic qualification of the certificate holder.

(4) Immediate action must have been taken, or begun to have been taken, upon discovery to terminate the conduct that resulted in the apparent violation.

(5) The certificate holder must develop and implement a comprehensive fix satisfactory to the FAA.

b. Ordinarily, the FAA will not forego legal enforcement action if the certificate holder informs the FAA of the apparent violation during routine FAA investigations/inspections, or in association with accidents and incidents.

c. The procedures to be followed when applying the voluntary disclosure policy are further described in the following paragraphs.

5. *NOTIFICATION BY THE CERTIFICATE HOLDER.* When a certificate holder notifies the FAA of an apparent violation, contact shall be made with, or directed to, the appropriate principal inspector. This contact must be made immediately after the apparent violation was discovered. The form of notification may be verbal, written hard copy, or written electronic copy. The FAA believes that it is more important for the initial notification to be immediate than for all the information to be complete. Therefore, the certificate holder should not delay notification and should cover, only to the extent possible, the following items with the principal inspector:

a. Brief description of the apparent violation, including an estimate of the duration of time that it remained undetected, as well as how and when it was discovered.

b. Verification that no additional violations occurred after the initial one was identified.

c. Brief description of the immediate action taken after the apparent violation was identified, the immediate action taken to terminate the conduct that resulted in the apparent

violation, and the person responsible for taking the immediate action.

d. Verification that an evaluation is underway to determine if there are any systemic problems and a description of the corrective steps necessary to prevent the apparent violation from recurring.

e. Identification of the person responsible for preparing the comprehensive fix.

f. Acknowledgment that a detailed written report will be provided to the principal inspector within 10 calendar days.

6. *FAA RESPONSE TO CERTIFICATE HOLDER NOTIFICATION.* The principal inspector responds with a written acknowledgment of the certificate holder's initial notification. This acknolwedgment includes the request for a written report and serves in lieu of a letter of investigation, provided the written report is completed in accordance with the voluntary disclosure reporting procedures set forth in this AC and appendix 1.

7. *CERTIFICATE HOLDER'S WRITTEN REPORT.* The written report should be provided to the principal inspector by the certificate holder within 10 calendar days after the initial notification was made. A sample format to be followed when completing this report is provided as appendix 1. In summary, the written report should include the following information:

a. A list of the specific FAR that may have been violated.

b. A description of the apparent violation, including the duration of time it remained undetected as well as how and when it was detected.

c. A description of the immediate action taken to terminate the conduct that resulted in the apparent violation,

including when it was taken, and who was responsible for taking the action.

d. An explanation that shows the apparent violation was inadvertent.

e. Evidence that demonstrates the seriousness of the apparent violation and the certificate holder's analysis of that evidence.

f. A detailed description of the proposed comprehensive fix, outlining the planned corrective steps, the responsibilities for implementing those corrective steps, and a time schedule for completion of the fix.

g. Identification of the company official responsible for monitoring the implementation and completion of the comprehensive fix.

8. *REVIEW BY THE FAA.* The FAA works with the certificate holder in order to ensure that the certificate holder's fix is acceptable to the FAA.

a. If a proposed comprehensive fix is not fully developed within 10 calendar days, the certificate holder should provide at least an overview of its comprehensive fix plans. In any event, a detailed description of the comprehensive fix should be provided to the principal inspector within 30 calendar days after the certificate holder initially notified the prncipal inspector of the apparent violation.

b. If the principal inspector determines that the proposed fix is acceptable, he/she will prepare a letter of correction that includes the date at which the comprehensive fix will be implemented and completed.

c. Following issuance of the letter of correction, the case is closed but remains subject to reopening in the event that

the agreed upon actions covered in the comprehensive fix are not completed to the satisfaction of the FAA.

d. The principal inspector has the authority to close the case. Consultation with regional specialists, the Assistant Chief Counsel for the region, or other inspectors may be accomplished when deemed appropriate by the principal inspector.

9. *IMPLEMENTATION OF A COMPREHENSIVE FIX.*

a. During the implementation period, the FAA and the certificate holder should continue to work together. The FAA has the latitude to advise and assist the certificate holder in correcting any identified systemic problems. Changes can be made to the corrective action plan outlined in the the comprehensive fix when the need is identified and the FAA concurs with the change. When a change to a comprehensive fix has been agreed upon, the principal inspector, or the inspector assigned to the case at the direction of the principal inspector, will prepare an amended letter of correction that reflects this change.

b. The FAA monitors the implementation of the corrective steps. Throughout the implementation period, the FAA assesses the certificate holder's corrective efforts and top management's awareness of these efforts. If, during this period, the FAA determines that the actual corrective steps accomplished are contrary to those documented in the comprehensive fix, the letter of correction may be rescinded and the investigative report reopened and appropriate legal enforcement action initiated.

c. At the conclusion of the implementation period, the principal inspector makes a final assessment. If all elements of the comprehensive fix have been adequately accomplished, the principal inspector deems the fix satisfactory. A statement of follow-up investigation, confirming that the comprehensive

fix was satisfactorily implemented and completed, shall be prepared to complete the FAA's investigative package.

d. If the same or similar violations are discovered subsequent to the FAA's completion of an investigative package, the FAA does not reopen the case unless it determines that the certificate holder failed to comply with all the elements of the comprehensive fix. Additionally, if a certificate holder decides to make further changes to programs or systems identified in a comprehensive fix once it becomes classified as satisfactory, these changes are not required to receive separate FAA approval under the terms of this disclosure policy.

10. *INFORMAL APPEALS PROCESS.* When disagreements occur regarding the acceptance of a proposed comprehensive fix, or changes to a comprehensive fix prior to its classification as satisfactory, the principal inspector and certificate holder may request that the issue be resolved at the next level of management within the FAA. This procedure will provide for an independent assessment of the areas in disagreement.

11. *SEPARATE ACTIONS AGAINST AIRMEN.*

a. The voluntary disclosure policy applies to individual airmen or other agents of a carrier when the carrier makes a disclosure and is the focal point of a case, and the following conditions are met:

(1) The apparent violation occurred while the airman or agent was acting on behalf of a certificate holder involved in FAR Parts 121 or 135 operations.

(2) The airman immediately must make the first report of the apparent violation to the employing certificate holder.

(3) The FAA is notified immediately. The employing certificate holder must notify the FAA of the apparent violation immediately after the airman reports it to the carrier.

b. If all the above conditions are not met, the principal inspector will review all facts associated with the case and determine what action is appropriate for individual airmen or other agents of the carrier.

12. *FREEDOM OF INFORMATION ACT (FOIA), 5 U.S.C. § 552.*

a. Records submitted to the FAA for review pursuant to the voluntary disclosure policy are protected, to the extent allowed by law, under Exemption 4 of the FOIA. Exemption 4 protects commercial or financial information submitted to it in confidence, if disclosure would, in this case: (1) impair the Government's ability to collect similar information in the future, or (2) cause harm to an "identifiable" governmental interest (5 U.S.C. § 552(b)(4))

b. The FAA has determined that both of the tests described in paragraph 12a apply to reports submitted to the FAA under the voluntary disclosure policy. The FAA is responsible for explaining to requesters why the records are exempted under FOIA. Guidelines for such responses can be found in Departmental Regulations, 49 CFR Part 7, Public Availability of Information. If the FAA is sued for the records, claims of "competitive harm" can be raised at that time.

13. *SUBSEQUENT VIOLATIONS.* If a subsequent violation occurs even though a comprehensive fix was satisfactorily completed and followed, the procedures outlined in this AC will apply. If the certificate holder does not disclose the subsequent violation to the FAA and it then is discovered by the FAA, or if the FAA independently uncovers a subsequent violation during routine surveillance, legal enforcement action will be initiated.

14. *CONCLUSION.* Development of Internal Evaluation Programs should help to ensure that any apparent violations are promptly identified, corrected, and reported to the FAA. While not required, the FAA strongly encourages certificate holders to make Internal Evaluation Programs an integral part of their everyday management process so that the full benefits of voluntary disclosure can be realized. Aviation safety is best served by programs that allow certificate holders to identify and correct their own instances of noncompliance and invest more resources in efforts to preclude their recurrence, rather than pay civil penalties.

/s/ David R. Harrington
David R. Harrington
Acting Director, Flight Standards Service

APPENDIX 1. SAMPLE FORMAT TO BE FOLLOWED BY CERTIFICATE HOLDERS WHEN SUBMITTING THE WRITTEN REPORT

The following sample is only a suggested format to be followed when preparing the written report that will be submitted to the FAA. While a certificate holder should include at least all the elements specified below, the structure of the written report can be modified by the certificate holder to fit the certificate holder's particular needs.

I. General

- A. Date
- B. Certificate type
- C. Certificate number
- D. Company name
- E. Company address
- F. Company official filing report
  1. Name
  2. Position
  3. Phone

II. Description of Apparent Violation

- A. Applicable FAR
- B. Date apparent violation was discovered
- C. Location of discovery
- D. Company official who discovered apparent violation
  1. Name
  2. Position
  3. Phone
- E. Date and time of initial notification to FAA
- F. Name of FAA official notified (Principal Inspector)
- G. Company official making notification
  1. Name
  2. Position
  3. Phone

H. Duration of time apparent violation remained undetected

1. Hours
2. Cycles
3. Days

I. Summary of apparent violation

(The summary should be a brief statement that describes the nature of the apparent violation and identifies the specific aircraft, engines, appliances, facilities, and/or individuals associated with the apparent violation.)

III. Immediate Action

A. When immediate action was taken

B. Description of immediate action

(This description should outline the immediate steps that were taken to cease the violative action.)

C. Company official responsible for immediate action

1. Name
2. Position
3. Phone

IV. Analysis

A. Summary of evidence

(This summary should describe the scope of the apparent violation and explain how it was detected. In addition, conclusions reached regarding possible or probable systemic deficiencies should be described.)

B. Reasons why the apparent violation was inadvertent

C. Supporting documentation

(The evidence associated with the apparent violation should be attached. This evidence should include a statement regarding how it determined the extent of the apparent violation.)

V. Comprehensive Fix Proposal

The proposed long term corrective steps to be taken by the certificate holder to preclude recurrence of the apparent violation should be listed in this section. Each corrective step should identify the individual or department responsible for implementing and completing the corrective step as well as the time allotted for completion of each corrective step.

Examples of types of questions or issues that a comprehensive fix proposal should address are as follows:

- Whether the apparent violation includes equipment, facilities, or individuals beyond those addressed in the initial notification and immediate action taken.

- Whether procedural or organizational changes are necessary.

- How will it be determined whether any procedural or organizational changes are effective?

- What procedures will be developed to ensure that the affected area periodically is reviewed in the future so that concerns can be identified before a violation occurs?

- Who will be responsible for performing periodic reviews?

- To whom in the certificate holder's organization will the results of these periodic reviews be reported, and how will they be documented?

VI. Responsibility for Monitoring the Implementation of the Comprehensive Fix

A. Name
B. Position
C. Phone
D. Signature

VII. FAA Acceptance (To be completed by the FAA)

A. Name
B. Position (Principal Inspector)
C. Date
D. Office
E. Signature

APPENDIX E

49 USCA § 40101
49 U.S.C.A. § 40101

UNITED STATES CODE ANNOTATED
TITLE 49. TRANSPORTATION
SUBTITLE VII – AVIATION PROGRAMS
PART A – AIR COMMERCE AND SAFETY
SUPART I – GENERAL
CHAPTER 401 – GENERAL PROVISIONS

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Current through P.L. 104-133, approved 4-25-96.

§ 40101. Policy

(a) Economic regulation. – In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(1) assigning and maintaining safety as the highest priority in air commerce.

(2) before authorizing new air transportation services, evaluating the safety implications of those services.

(3) preventing deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.

(4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

(5) coordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions.

(6) placing maximum reliance on competitive market forces and on actual and potential competition —

(A) to provide the needed air transportation system; and

(B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.

(7) developing and maintaining a sound regulatory system that is responsive to the needs of the public and in which decisions are reached promptly to make it easier to adapt the air transportation system to the present and future needs of —

(A) the commerce of the United States;

(B) the United States Postal Service; and

(C) the national defense.

(8) encouraging air transportation at major urban areas through secondary or satellite airports if consistent with regional airport plans of regional and local authorities, and if endorsed by appropriate State authorities —

(A) encouraging the transportation by air carriers that provide, in a specified market, transportation exclusively at those airports; and

(B) fostering an environment that allows those carriers to establish themselves and develop secondary or satellite airport services.

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

(11) maintaining a complete and convenient system of continuous scheduled interstate air transportation for small communities and isolated areas with direct financial assistance from the United States Government when appropriate.

(12) encouraging, developing and maintaining an air transportation system relying on actual and potential competition.

(A) to provide efficiency, innovation, and low prices; and

(B) to decide on the variety and quality of, and determine prices for, air transportation services.

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.

(14) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(15) strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.

(b) All-cargo air transportation considerations. — In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others and in addition to the matters referred to in subsection (a) of this section, as being in the public interest for all-cargo air transportation:

(1) encouraging and developing an expedited all-cargo air transportation system provided by private enterprise and responsive to —

(A) the present and future needs of shippers;

(B) the commerce of the United States; and

(C) the national defense.

(2) encouraging and developing an integrated transportation system relying on competitive market forces to decide the extent, variety, quality, and price of services provided.

(3) providing services without unreasonable discrimination, unfair or deceptive practices, or predatory pricing.

(c) General safety considerations. — In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator of the Federal Aviation Administration shall consider the following matters:

(1) the requirements of national defense and commercial and general aviation.

(2) the public right of freedom of transit through the naviagable airspace.

(d) Safety considerations in public interest. — In carrying out subpart III of this part and those provisions of sub-

part IV applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

(1) regulating air commerce in a way that best promotes its development and safety and fulfills national defense requirements.

(2) promoting, encouraging, and developing civil aeronautics.

(3) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations.

(4) consolidating research and development for air navigation facilities and the installation and operation of those facilities.

(5) developing and operating a common system of air traffic control and navigation for military and civil aircraft.

(6) providing assistance to law enforcement agencies in the enforcement of laws related to regulation of controlled substances, to the extent consistent with aviation safety.

(e) **International air transportation. — In** formulating United States international air transportation policy, the Secretaries of State and Transportation shall develop a negotiating policy emphasizing the greatest degree of competition compatible with a well-functioning international air transportation system, including the following:

(1) strengthening the competitive position of air carriers to ensure at least equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.

(2) freedom of air carriers and foreign air carriers to offer prices that correspond to consumer demand.

(3) the fewest possible restrictions on charter air transportation.

(4) the maximum degree of multiple and permissive international authority for air carriers so that they will be able to respond quickly to a shift in market demand.

(5) eliminating operational and marketing restrictions to the greatest extent possible.

(6) integrating domestic and international air transportation.

(7) increasing the number of nonstop United States gateway cities.

(8) opportunities for carriers of foreign countries to increase their access to places in the United States if exchanged for benefits of similar magnitude for air carriers or the traveling public with permanent linkage between rights granted and rights given away.

(9) eliminating discrimination and unfair competitive practices faced by United States airlines in foreign air transportaiton, including —

(A) excessive landing and user fees;

(B) unreasonable ground handling requirements;

(C) unreasonable restrictions on operations:

(D) prohibitions against change of gauge; and

(E) similar restrictive practices.

(10) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(f) Strengthening competition. — In selecting an air carrier to provide foreign air transportation from among competing applicants, the Secretary of Transportation shall consider, in addition to the matters specified in subsections (a) and (b) of this section, the strengthening of competition among air carriers operating in the United States to prevent unreasonable concentration in the air carrier industry.

CREDIT(S)

1996 Interim Update
(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1094.)

Supreme Court, U.S.
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(2)

No. 96-157

In The

Supreme Court of the United States

October Term, 1995

In Re: USAir, Inc.

On Petition For Writ Of Prohibition
To The United States District Court
For The District Of South Carolina

BRIEF OF RESPONDENTS

JAMES W. ORR, ESQUIRE
(Counsel of Record)
BOWERS ORR & ROBERTSON
1401 Main Street
Suite 1100
P.O. Box 7307
Columbia, SC 29202
(803) 252-0494

DAVID E. RAPOPORT, ESQUIRE
RAPOPORT & KUPETS
LAW OFFICES
O'Hare International Center
10275 West Higgins Road
Suite 370
Rosemont, IL 60018
(847) 803-9880

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

QUESTION PRESENTED FOR REVIEW*

1. Whether USAir has established, by clear and indisputable evidence, that the courts below, interpreting state privilege law, usurped judicial power by ruling that the documents USAir sought to protect were not privileged.

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* Pursuant to Rule 24(2) of the Rules of the Supreme Court of the United States, this section is included because Respondents are dissatisfied with its presentation by USAir.

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SUMMARY OF THE ARGUMENT

To be entitled to a writ of prohibition USAir must prove, by "clear and indisputable evidence," that: 1) the controlling state law, whether that of South Carolina or North Carolina, recognizes the self-critical evaluation privilege; 2) the documents at issue fall within the privilege; and 3) its "rights" will be irretrievably lost if it produces the documents or the wrong otherwise can never be effectively presented on appeal. USAir cannot meet this burden. Thus, its Petition for Writ of Prohibition should be denied.

ARGUMENT

A. TO PREVAIL USAIR MUST SHOW THAT ITS RIGHT TO ISSUANCE OF A WRIT OF PROHIBITION IS CLEAR AND INDISPUTABLE.

The issuance of a writ of mandamus or prohibition "is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace v. Mayacamas*, 485 U.S. 271 (1988). The power to issue such writs is discretionary and should be sparingly exercised. *Par v. United States*, 351 U.S. 513, *reh'g denied*, 352 U.S. 859 (1956). A writ may not be relied upon as a means for invoking review of non-appealable interlocutory orders, which do not impair the actual or potential jurisdiction of the court. *Carr v. Donohoe*, 201 F.2d 426 (8th Cir. 1953).

This Court recently reviewed the legal standards for obtaining a writ of mandamus in *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296 (1989):

> We have required that petitioners demonstrate a "clear abuse of discretion," or conduct amounting to "usurpation of [the judicial] power," to be entitled to issuance of the writ. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek, and carry "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable.' "

Id. at 309 (*citations omitted*).

Generally, discovery orders are not reviewable by a writ of mandamus or prohibition. *Von Bulow v. Von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987). This stringent legal standard is particularly appropriate where, as here, a party seeks to create a new testimonial privilege. "[T]his Court has well understood that the particular value the courts are distinctively charged with preserving – justice – is severely harmed by contravention of 'the fundamental principle that the public . . . has a right to every man's evidence.' " *Jaffee v. Redmond*, ___ U.S. ___, ___, 116 S.Ct. 1923, 1933 (1996) (Op. of Scalia, J. joined by Rehnquist, C.J., dissenting) (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Therefore, testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Even if there has been a clear abuse of discretion relief does not automatically follow. Rather USAir must prove the "wrong . . . otherwise can never be effectively presented on appeal," or that its rights will be irretrievably lost if the petition is not granted. *Kerr v. United States*

District Court for the Northern District of California, 426 U.S. 394 (1976). Therefore, to prevail USAir must prove, by clear and indisputable evidence, that the courts below either abused their discretion or usurped authority and as a result USAir's rights will be irretrievably lost unless its petition is granted.

B. USAIR HAS FAILED TO SHOW THAT THE DOCUMENTS IN QUESTION ARE SUBJECT TO ANY PRIVILEGE.

1. THE COURTS BELOW FOUND THAT THE SELF-CRITICAL EVALUATION PRIVILEGE WAS NOT APPLICABLE.

In the trial court, USAir argued that South Carolina substantive privilege law applied[1] and that South Carolina recognized the self-critical evaluation privilege. USAir did not convince the trial court either that South Carolina law applied or that it would recognize the self-critical evaluation privilege if it did. On the contrary, Judge Anderson held:

> The court, however, finds it unnecessary to decide the troublesome issue of which state's

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[1] As District Court Judge Joseph F. Anderson, Jr. explained: "Federal Rule of Evidence 501 provides that where an action is governed by federal law, issues of privilege are determined in accordance with federal common law. Where, however, as here, the matter before the court is based upon diversity of citizenship, 'the privilege . . . shall be determined in accordance with state law.' Fed. R. Evid. 501." *In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated October 2, 1995*, p. 2a (D.S.C. October 1995) (Appendix A to Petition for Writ of Prohibition).

> law should apply, or, alternatively, to what extent the law of either North Carolina or South Carolina would recognize the self-critical evaluation privilege. The court's review of the documents for which this privilege is asserted yields the conclusion that even if the relevant state recognized the self-critical evaluation privilege such a privilege would not apply under the circumstances presented here.

In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated October 2, 1995, p. 4a (D.S.C. October 1995) (Appendix A to Petition for Writ of Prohibition). Furthermore, the district court stated, "[t]he Supreme Court and the circuit courts have neither definitely denied the existence of such a privilege, nor accepted it and defined its scope. Rather when confronted with a claim of the privilege, they refused on narrow grounds to apply it to the facts before them. . . . " *In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated October 2, 1995*, p. 4a (D.S.C. October 1995) (quoting *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 427 fn1 (9th Cir. 1992)) (Appendix A to Petition for Writ of Prohibition).

In denying USAir's Writ of Prohibition, the Court of Appeals ruled in the following manner:

> [h]aving carefully reviewed the record and received the arguments of the parties and the *amicus curiae* we conclude that the district court did not clearly abuse its discretion or usurp judicial power in entering the challenged discovery order. *Cf. Mallard v. United States Dist.*

Court, 490 U.S. 296 309 (1989). Accordingly, USAir's petition is denied.

In Re: USAir, Inc., Order Dated May 2, 1996, p. 9a (4th Cir. 1996) (Appendix B to Petition for Writ of Prohibition).

2. THE COURTS BELOW DID NOT USURP THE FEDERAL AVIATION ADMINISTRATION'S AUTHORITY OR OTHERWISE ABUSE THEIR DISCRETION.

Apparently, USAir has now abandoned its claim that the trial judge abused his discretion and appears to rest solely on the contention, based on the Federal Aviation Administration's Advisory Circular 120-56 ("AC 120-56"), that the courts below usurped the Federal Aviation Administration's ("FAA") authority to make factual determinations.[2] *Petition for Writ of Prohibition*, pp. 4-9.

USAir's reliance on AC 120-56 is not only wrong, the argument is frivolous. The title of the Advisory Circular alone demonstrates the inapplicability of the document: *"Air Carrier **Voluntary Disclosure Reporting** Procedures."* (*emphasis added*). USAir's assertion that the FAA has endorsed the concept of a common law self-critical evaluation privilege for airline internal safety reviews that would bind state courts in tort cases finds no support in the language of the Advisory Circular. The plain language of AC 120-56 establishes that the FAA merely

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[2] While the Federal Aviation Administration's Advisory Circular 120-56 relied upon so heavily by USAir in this Court has been in effect since 1992, it was not even cited to the trial judge.

grants immunity from its civil penalties when an airline elects "to voluntarily disclose apparent violations to the Federal Aviation Administration." *Advisory Circular* 120-56, p. 12a (Appendix D to Petition for Writ of Prohibition). Under this program, an airline must upon detection of a violation *promptly disclose the violation to the FAA* and take timely corrective action to ensure that the same or similar violations do not recur. Before an airline obtains immunity from civil penalties under AC 120-56, the FAA must determine that the following five conditions are met:

(1) The certificate holder immediately notified the FAA of the apparent violation after detecting it and before the agency learned of it.

(2) The apparent violation must have been inadvertent.

(3) The apparent violation does not indicate a lack, or reasonable question, of basic qualification of the certificate holder.

(4) Immediate action must have been taken, or begun to have been taken, upon discovery to terminate the conduct that resulted in the apparent violation.

(5) The certificate holder must develop and implement a comprehensive fix satisfactory to the FAA.

Advisory Circular 120-56, pp. 14a-15a (Appendix D to Petition for Writ of Prohibition).

The documents USAir seeks to protect *were not disclosed* to the FAA. Any violations discovered *were not reported* to the FAA. That USAir may have learned of

dangerous practices or violations of the Federal Aviation Regulations in this audit and failed to report them to the FAA is the *exact opposite* type of conduct than AC 120-56 was intended to foster.

The voluntary disclosure policy states, "[t]he FAA believes that the **open sharing** of apparent violations and a cooperative as well as an advisory approach to solving problems will enhance and promote aviation safety." (*emphasis added*) Advisory Circular 120-56, p. 14a (Appendix D to Petition for Writ of Prohibition). The intent of AC 120-56 is clear. It is to promote open communications between the airlines and the FAA. Any attempt to read this advisory circular as promoting a general policy of nondisclosure is wrong.

USAir's reliance on *Jaffee v. Redmond*, ___ U.S. ___, 116 S.Ct. 1923, 1933 (1996) to support its argument for a self-critical evaluation privilege is misplaced. In *Jaffe*, after all fifty states recognized the psychotherapist privilege, this Court considered whether that privilege should be recognized under federal common law in a Section 1983[3] case. In concluding that the privilege should be recognized, this Court explained: "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears. . . . [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Jaffee*, 116 S.Ct. at 1928. The Court also notes that the Judicial Conference Advisory Committee in

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[3] 42 U.S.C. § 1983.

1972 recommended that "Congress recognize a psychotherapist privilege. . . . " *Id.*

Jaffee is not at all analogous to this case. While USAir continues to claim that the flow of information will be curtailed in the future unless this Court finds these documents to be privileged, it has presented *no evidence* in support of this self-serving conclusion. USAir asks this Court to accept *on faith* that a privilege is mandatory to get USAir to conduct ongoing internal safety audits.[4] USAir's claim that it will not conduct safety audits if they are discoverable is not credible. Few courts have ever recognized the self-critical evaluation privilege. None have applied it to documents like those USAir seeks to protect. Thus, at the time USAir prepared the subject documents or had them prepared, it could not have relied on the existence of a privilege. Yet, the documents were prepared anyway, clear evidence that a privilege is *not needed* to encourage airlines to self inspect.

USAir conducts safety audits for good reasons having little or nothing to do with litigation issues. And USAir will continue to because it is in its best interests to do so, with or without a privilege. It is in USAir's best interests because a reputation for safety renders its service more marketable. *Cf. Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992). As Judge Anderson explained:

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[4] USAir's claim, if accurate, would demonstrate an irresponsibility for the safety of the flying public inconsistent with the privilege conferred upon USAir by the FAA to transport passengers for hire.

> It is beyond dispute that the airline industry is highly competitive and tightly regulated. Moreover, all airlines have a keen interest in advancing and promoting safety as well as improving service. Airlines are, therefore, likely to conduct internal audits from time to time to insure improved efficiency (both in terms of service and economy), safety, and marketability. While disclosure of these audits to competitors of USAir would certainly deter use of them in the future, disclosure for limited use in litigation (such as to prove notice) is unlikely to deter their use.

In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated October 2, 1995, p. 6a (D.S.C. October 1995) (Appendix A to Petition for Writ of Prohibition).

In *Jaffee*, an interpretation of federal law was at issue. The instant case involves the interpretation of state law. In *Jaffee*, all fifty states and the District of Columbia recognized the psychotherapist privilege. In the instant case, almost no states recognize the self-critical evaluation privilege. The Judicial Conference Advisory Committee recommended adoption of the psychotherapist privilege, no similar recommendation was made regarding the self-critical evaluation privilege. In *Jaffee*, there was a split among the appellate courts over whether or not the psychotherapist privilege should be recognized under federal law. In contrast, the two courts of appeals to address the self-critical evaluation privilege refused to protect allegedly privileged documents. *In Re: USAir, Inc., Order Dated May 2, 1996* (4th Cir. 1996); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992).

In summary, the courts below did not usurp authority or abuse their discretion in rejecting USAir's privilege claims. Testimonial privileges are in derogation of the search for truth and should, therefore, not be lightly created nor expansively construed. Advisory Circular 120-56 is inapplicable on its face. USAir has wisely abandoned its arguments that the courts below abused their discretion. Therefore, USAir has failed to prove by any evidence, let alone that which is "clear and indisputable," that it is entitled to a writ of prohibition.

3. USAIR HAS NOT ESTABLISHED BY CLEAR AND INDISPUTABLE EVIDENCE ITS RIGHTS WILL BE IRRETRIEVABLY LOST UNLESS THIS COURT ACTS.

There is no risk that any of USAir's rights will be irretrievably lost if this Court does not issue a writ of prohibition. The contested documents have been and still are covered by a protective order issued by the District Court.[5] Furthermore, after this Court denied USAir's

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[5] On November 14, 1995, Judge Anderson granted a protective order governing the possible uses of the six documents when produced. In particular, the court ruled:

> WHEREFORE, IT IS ORDERED that plaintiffs and their counsel shall be prohibited from disclosing, disseminating or communicating in any manner to any person or entity not involved in this litigation any portion of the information contained in those documents designated numbers 3, 4, 5, 20, 21, and 28 on defendant's list of privileged documents, which list was filed on September 20, 1995. Plaintiffs and their counsel shall be further precluded from utilizing

motion for a stay, the subject documents were produced on August 26, 1996. Therefore, subject to the protective order, Respondents are now in possession of the contested documents.

There is no indication that the protective order has been or will be violated by any of the parties to this litigation. There have been no rulings on the admissibility of the documents at trial. Such rulings are fully reviewable by proper post-trial procedures. USAir rights will not be irretrievably lost if this Court denies its Petition for Writ of Prohibition. Indeed, since the documents have now been produced, it is questionable whether a justiciable issue remains to be decided by this Court at all.

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these documents or the information contained in them for any purpose other than for this multidistrict litigation.

In furtherance of this order, plaintiffs' counsel shall insure that each person who is to be given access to the referenced documents, including plaintiffs and their attorneys, shall first sign a document acknowledging that they are aware of and will comply with this order. Plaintiffs' counsel shall maintain a list of these persons which shall be provided to Petitioner's attorneys upon request, subject to protection upon application to this court for good cause shown.

In Re Air Crash at Charlotte, North Carolina on July 2, 1994, MDL 1014, Order of Judge Joseph F. Anderson, Jr., Dated November 14, 1995 (D.S.C.) (Attached to Respondents' Brief as Appendix A).

CONCLUSION

Wherefore, Respondents request that this Court deny USAir's Petition for Writ of Prohibition.

Respectfully submitted,

JAMES W. ORR, ESQUIRE
(Counsel of Record)
BOWERS ORR & ROBERTSON
1401 Main Street, Suite 1100
P.O. Box 7307
Columbia, SC 29202
(803) 252-0494

DAVID E. RAPOPORT, ESQUIRE
RAPOPORT & KUPETS LAW OFFICES
O'Hare International Center
10275 West Higgins Road
Suite 370
Rosemont, IL 60018
(847) 803-9880

Counsel for Respondents

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

IN RE: AIR CRASH AT CHARLOTTE, NORTH CAROLINA ON JULY 2, 1994	MDL DOCKET NO. 1041 JUDGE JOSEPH F. ANDERSON, JR. ORDER ON USAIR'S MOTION FOR RECONSIDERATION (SELF CRITICAL EVALUATION PRIVILEGE) (Filed Nov. 14, 1995)

Defendant USAir, Inc. ("USAir") has moved for reconsideration of this court's Order denying USAir's motion for a protective order and granting plaintiffs' motion to compel discovery of specified documents as to which USAir claims a self-critical evaluation privilege. Order filed October 26, 1995. This court grants the motion for reconsideration to the extent it seeks to limit the possible uses of the documents to be produced. The motion for reconsideration is denied in all other respects.

WHEREFORE, IT IS ORDERED that plaintiffs and their counsel shall be prohibited from disclosing, disseminating or communicating in any manner to any person or entity not involved in this litigation any portion of the information contained in those documents designated numbers 3, 4, 5, 20, 21, and 28 on defendant's list of

privileged documents, which list was filed on September 20, 1995. Plaintiffs and their counsel shall be further precluded from utilizing these documents or the information contained in them for any purpose other than for this multidistrict litigation.

In furtherance of this order, plaintiffs' counsel shall insure that each person who is to be given access to the referenced documents, including plaintiffs and their attorneys, shall first sign a document acknowledging that they are aware of and will comply with this order. Plaintiffs' counsel shall maintain a list of these persons which shall be provided to USAir's attorneys upon request, subject to protection upon application to this court for good cause shown.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

November 14, 1995
Columbia, South Carolina

MOTION FILED
AUG 29 1996

(3)

Docket No. 96-157

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In Re: USAir, Inc.

ON PETITION FOR WRIT OF PROHIBITION
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA

MOTION OF AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

LOUISE B. COBBS*
HAIGHT, GARDNER, POOR & HAVENS
2000 Pennsylvania Avenue, N.W., Suite 4400
Washington, D.C. 20006
Tel: (202) 496-2700

*Counsel of Record for the
Amicus Curiae

August 29, 1996

38 pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-157

In Re: USAir, Inc.

ON PETITION FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH CAROLINA

MOTION OF AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT PETITION FOR WRIT OF PROHIBITION

The Air Transport Association of America ("ATA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case.

The ATA has notified all other parties to this action and has received the following responses to its request for consent to file this brief *amicus curiae*: Petitioner, USAir, Inc. has consented; David Rapoport, Rapoport & Kupets Law Offices, has objected on behalf of plaintiffs below; and no other party has responded.

The ATA is a non-profit unincorporated association of federally-certificated air carriers providing scheduled and charter passenger and cargo air transportation. ATA represents the

interests of U.S. airlines[1] that account for more than 95 percent of domestic passenger and cargo traffic. Its principal function is to represent the interests of the U.S. commercial airline industry before the United States Congress, federal agencies, state legislatures, and before federal and state courts. ATA works closely with federal agencies concerned with aviation safety and provides a forum in which airlines can discuss and encourage safety initiatives through industry working groups. ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members, including an *amicus* brief in the court below.

In the court below, Petitioners and ATA argued for application of the self-critical analysis privilege to protect from disclosure certain internal airline safety reports. The ATA as *amicus* is uniquely able to describe the significant effect on the airline industry's safety programs if the decision of the court below is allowed to stand. The Court has consistently allowed industry associations, including, *e.g.*, the ATA, to file briefs as *amicus curiae*. *See American Airlines, Inc. v. Wolens*, __ U.S.__, 115 S.Ct. 817 (1995); *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994).

Millions of passengers justifiably rely on ATA's member airlines, whose excellent safety record is due in part to internal safety review mechanisms that the self-critical analysis privilege is designed to protect and foster. The self-critical analysis privilege has been applied by many courts, primarily trial courts in

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[1] ATA's members are: Alaska Airlines,Inc.; Aloha Airlines, Inc.; America West Airlines, Inc.; American Airlines, Inc.; American Trans Air, Inc; Continental Airlines, Inc.; Delta Air Lines, Inc.; DHL World Airways, Inc.; Evergreen International Aviation, Inc.; Federal Express Corp.; Hawaiian Airlines, Inc.; Kiwi International Airlines, Inc.; Midwest Express Airlines, Inc.; Northwest Airlines, Inc.; Polar Air Cargo, Inc.; Reeve Aleutian Airways, Inc.; Southwest Airlines Co.; Trans World Airlines, Inc.; United Airlines, Inc.; United Parcel Service Co.; and USAir, Inc. Associate members are: Air Canada; Canadian Airlines International; and KLM-Royal Dutch Airlines.

interlocutory orders addressing discovery disputes. The federal courts of appeals have also recognized the privilege, but have disagreed on its elements and have applied it in an uneven, inconsistent, and unpredictable manner, including the court below. Further, the decision of the court below ignored the criteria set forth in this Court's decision in *Jaffee v. Redmond*, __ U.S. __, 116 S.Ct. 1923 (1996).

The lack of clarity in the federal courts of appeals regarding the scope and application of the privilege has a serious chilling effect on airlines' ability to engage in full and frank internal safety analyses. In ATA's view, not only does Petitioner raise an important question of federal law worthy of this Court's consideration, but the chilling effect of the lower courts' disarray on the scope of the self-critical analysis privilege provides an additional compelling reason for this Court's review.

Accordingly, ATA seeks the Court's permission to file this brief *amicus curiae* to demonstrate that the self-critical analysis privilege is crucial to fostering meaningful internal safety reviews that benefit the travelling public. Failure to recognize and apply the privilege to internal airline safety audits and reviews is contrary to public policy and is inconsistent with Congressional and Federal Aviation Administration policies protecting safety data. Further, failure to so apply the privilege will have a substantial chilling effect on the frankness and completeness of such reviews.

WHEREFORE, ATA respectfully requests leave to file the attached brief.

Respectfully submitted,

LOUISE B. COBBS*
HAIGHT, GARDNER, POOR & HAVENS
2000 Pennsylvania Ave., NW, Suite 4400
Washington, DC 20006-1812
(202) 496-2700

* Counsel of Record for *Amicus Curiae*
Air Transport Association of America

QUESTIONS PRESENTED

1. Does the failure of the court below to follow the criteria set forth in *Jaffee* and *Upjohn* for applying a privilege add to judicial confusion regarding the self-critical analysis privilege and ignore compelling public policies protecting airline safety reviews?

2. Does the public policy of and the public interest in fostering airline safety compel the protection from discovery of internal airline documents analyzing airline operations under the self-critical analysis privilege?

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Culinary Foods, Inc. v. Raychem Corp., 151 F.R.D. 297 (N.D. Ill. 1993) 9

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FTC v. TRW, Inc., 628 F.2d 207 (D.C. Cir. 1980) . . . 10, 11

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Granger v. National R.R. Passenger Corp., 116 F.R.D. 507 (E.D. Pa. 1987) 10

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Jaffee v. Redmond, _U.S._, 116 S.Ct. 1923 (1996) . . . 3, 5, 6

Keyes v. Lenoir Rhyne College, 552 F.2d 579
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Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518
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McDonnell Douglas Corp. v. EEOC, 922 F. Supp. 235
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O'Keefe v. Boeing Co., 38 F.R.D. 329 (S.D.N.Y. 1965) . . 11

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Reynolds Metals Co. v. Rumsfield, 564 F.2d 663
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Southern Ry. Co. v. Lanham, 403 F.2d 119
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49 U.S.C. § 44701(c) 2, 16

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OTHER AUTHORITIES

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H.R. 3159, 104th Cong. 2d. Sess. (1996) 17

H.R. 3536, 104th Cong. 2d. Sess. (1996) 17

S.1994, 104th Cong. 2d. Sess. (1996) 17

A Call for the Development of Prototype(s) for a Global Analysis and Information Network (GAIN), 61 Fed. Reg. 21522 (1996) 18, 19

Federal Aviation Administration (FAA) Advisory Circular (AC) 120-56 . . . . . 11, 15, 19

Robert J. Busch, Comment, *Stimulating Corporate Self-Regulation -- The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U.L. REV. 597 (1993) 6, 9, 13

Flight Safety Foundation, News, *FSF Chairs Aviation Industry Data-sharing Task Force*, Feb. 13, 1996 18

1 MICHAEL H GRAHAM, HANDBOOK OF FEDERAL EVIDENCE (4th ed. 1996) 5

William B. Johnson, Annotation, *Discoverability of Traffic Accident Reports and Derivative Information*, 84 A.L.R.4th 15 (1987) 13

David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113 (1988) 13

National Transportation Safety Board Reauthorization: Joint Hearings before the Subcomm. on Aviation, Subcomm. on Railroads of the House Comm. on Trans. and Infrastructure, 104th Cong., 2d. Sess. 39 (1996) (Statement of Jim Hall, Chairman, NTSB) 17, 18

Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083 (1983) 7, 10, 13

NTSB Comparison of U.S. Transportation Fatalities - Year 1994 vs. Year 1995 (Dec. 31, 1995) 1

John F.X. Peloso, *The Privilege for Self-Critical Analysis: Protecting the Public by Protecting the Confidentiality of Internal Investigations in the Securities Industry*, 18 SEC. REG. L.J. 229 (1990) 13

Paul B. Taylor, *Encouraging Product Safety Testing by Applying the Privilege of Self-Critical Analysis When Punitive Damages are Sought*, 16 HARV. J.L. & PUB. POL'Y, 769 (1993) 13

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-157

In Re: USAir, Inc.

ON PETITION FOR WRIT OF PROHIBITION
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA

BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

INTRODUCTION

Public policy has demanded that aviation safety be minutely scrutinized ever since airplanes began carrying passengers. Today, more than ever, aviation safety is on everyone's mind. Despite the fact that the U.S. aviation industry is the safest in the world, and is considerably safer than traveling by automobile[1], aviation safety is a constant topic of public debate. It is also a constant topic of private internal analysis and discussion at U.S. airlines.

Understanding the causes of accidents and other incidents is the primary objective of airlines' internal safety reviews and audits. Only free and frank discussion and investigation of

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[1] According to National Transportation Safety Board ("NTSB") estimates, there were 41,700 highway fatalities in 1995 whereas there were only 177 fatalities in involving U.S. airlines, including commuter airlines. NTSB Comparison of U.S. Transportation Fatalities -Year 1994 vs. Year 1995 (Dec. 31, 1995).

accidents, incidents, trends, and procedures without apprehension about whether such investigations will later become the focus of discovery, can serve the public policy goals expressed in the Transportation Laws. *See* 49 U.S.C. § 40101(a)(1) (mandating safety as the Department of Transportation's highest priority in air commerce); 49 U.S.C. § 44701(c) (requiring the FAA to regulate in a way to reduce or eliminate accidents). The privilege against disclosure of self-critical analysis should be applied to airlines' internal safety reviews in recognition and support of the important legislative and human goal of airline safety.

The U.S. aviation industry's safety record is neither accidental nor routine. Indeed, the industry's safety record is due, in large part, to policies set independently at each airline that require and encourage employees to vigilantly assess day-to-day operational safety for inconsistencies. The ability of airline management to solicit and obtain frank information regarding an airline's operational safety, and suggestions to improve that safety, is the linchpin of the industry's enviable record.[2] Just as there is nothing routine about safety, there is nothing routine about airline internal safety reviews. The airlines' highest management demand not only consistent internal safety investigations but also special investigations into particular matters that may be of concern.

Among federal and state courts that have had to address the self-critical analysis privilege, there is considerable confusion and conflict as to the privilege's scope and application. As this Court stated in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981):

> An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

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[2] Aircraft manufacturers have similar quality assurance and review programs that solicit safety-related suggestions.

In light of this Court's ruling only last term in *Jaffee, v. Redmond*, __U.S.__, 116 S.Ct. 1923 (1996), this observation is particularly apropos. The failure of the court below to follow the rationale articulated in *Jaffee* infects this issue with the uncertainty condemned in *Upjohn* and jeopardizes the ability of airlines to maintain and improve airline safety.

The Court should not allow the present state of disarray to continue. The parameters of the self-critical analysis privilege, over which state and federal courts disagree, presents a compelling issue which this Court should settle under FED. R. EVID. 501. This issue is especially compelling because of the importance of this privilege to promoting practices and procedures in the U.S. airline industry intended to maintain and improve safety. The prevailing confusion and conflict is inconsistent with the kind of candid, thorough, and systematic safety reviews necessary to ensure that air carriers satisfy their "duty . . . to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A).

The first part of this brief discusses the failure of the court below to follow *Jaffee*, the courts' confusion about the scope and application of the self-critical analysis privilege, and the history of the privilege. The second and third parts discuss the applicability of the privilege in the aviation context and the statutory and regulatory support for the privilege, respectively.

INTEREST OF *AMICUS CURIAE*

The ATA is a non-profit unincorporated association of federally-certificated air carriers providing scheduled and charter passenger and cargo air transportation. ATA represents the interests of U.S. airlines[3] that account for more than 95 percent of domestic passenger and cargo traffic. Its principal function is to represent the interests of the U.S. commercial airline industry before the United States Congress, federal agencies, state legislatures, and before federal and state courts. ATA works closely with federal agencies concerned with aviation safety and provides a forum in which airlines can discuss and encourage safety initiatives through industry working groups. ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members, including an *amicus* brief in the court below.

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[3] ATA's members are: Alaska Airlines,Inc.; Aloha Airlines, Inc.; America West Airlines, Inc.; American Airlines, Inc.; American Trans Air, Inc; Continental Airlines, Inc.; Delta Air Lines, Inc.; DHL World Airways, Inc.; Evergreen International Aviation, Inc.; Federal Express Corp.; Hawaiian Airlines, Inc.; Kiwi International Airlines, Inc.; Midwest Express Airlines, Inc.; Northwest Airlines, Inc.; Polar Air Cargo, Inc.; Reeve Aleutian Airways, Inc.; Southwest Airlines Co.; Trans World Airlines, Inc.; United Airlines, Inc.; United Parcel Service Co.; and USAir, Inc. Associate members are: Air Canada; Canadian Airlines International; and KLM-Royal Dutch Airlines.

ARGUMENT

I. THE COURT BELOW FAILED TO FOLLOW PRINCIPLES RECENTLY SET FORTH BY THIS COURT, ADDED TO JUDICIAL CONFUSION, AND FAILED TO RECOGNIZE STATUTORY PUBLIC POLICY GOALS

A. The Court Below Failed to Follow This Court's Decision in *Jaffee* in Applying the Self-Critical Analysis Privilege

Only last term, in *Jaffee v. Redmond*, __U.S.__, 116 S.Ct. 1923 (1996), this Court recognized the existence of a new psychotherapist-patient privilege under FED. R. EVID. 501 and reaffirmed that Congressional intent in drafting Rule 501 was for the "federal courts to 'continue the evolutionary development of testimonial privileges'". *Id.* at __, 116 S.Ct. at 1928 (citations omitted).[4] This Court looked to several factors in deciding that

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[4] *Jaffee* was brought under federal question jurisdiction and hence federal common law applied to the privilege under FED. R. EVID. 501. In the instant litigation, federal jurisdiction arose initially out of diversity, although USAir has consistently raised federal preemption as an affirmative defense. While the general rule would be to apply state privilege in diversity cases, "where state and federal issues are commingled . . . [c]ourts that have confronted this issue in the context of the discoverability of evidence have uniformly held that the federal law of privilege governs even where the evidence sought might be relevant to a pendant state claim." 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 501.1, at 511 n.8 (4th ed. 1996). Hence, as in *Jaffee*, this Court can and should address the federal common law privilege of self-critical analysis under Rule 501.

Because of the confusion about the parameters of the self-critical analysis privilege, federal courts, including the district court below, have looked beyond their own jurisprudence for a clear doctrinal rule. *See* Order of Judge Anderson, Oct 25, 1995, *In re Air Crash at Charlotte North Carolina on July 2, 1994* (M.D.L. No. 1041) at 4-5 (Appendix A to USAir's Petition) (looking to a number of federal appellate and district court decisions rather than North Carolina or South Carolina state law for jurisprudential guidance in applying the self-critical analysis privilege); *Siskonen v. Stanadyne, Inc.*, 124 F.R.D. 610, 611-12 (W.D.

the privilege described in *Jaffee* "'promotes sufficiently important interests to outweigh the need for probative evidence . . .'" *Id.* (citations omitted). Among the factors that counselled for recognition of the new privilege was that psychotherapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Id.* That rationale is consistent with *Upjohn*, where the Court recognized the "Hobson's choice" facing corporate counsel absent a privilege.[5]

The *Jaffee* test for the recognition of a privilege is four-fold: (1) The communication must "depend upon an atmosphere of confidence and trust . . . to make a frank and complete disclosure of facts . . ." *Jaffee*, __U.S. at __, 116 S.Ct. at 1928; (2) The privilege must serve a public interest such as the "transcendent public good" of mental or physical health of the citizenry. *Id.* at __, 116 S.Ct. at 1929; (3) The public benefits of non-disclosure must outweigh the evidentiary benefit of disclosure so that important communications will not be chilled; and (4) The general support of such privilege in the legislative and judicial communities.

Mich. 1989) (looking to federal jurisprudence in diversity case absent precedent under Michigan law).

[5] *Upjohn*, 449 U.S. at 391. *See also* Robert J. Busch, Comment, *Stimulating Corporate Self-Regulation – The Corporate Self-Evaluative Priviledge: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U.L. REV. 597, 599-600 (1993) [hereinafter Busch, Comment] (noting that corporations are faced with "discordant stimuli" with regulators and consumers calling for "aggressive self-policing" but with "perverse" countervailing incentives that chill such efforts).

Airlines' internal safety audits and investigations meet all of the criteria for application of the self-critical analysis privilege.[6]

1. Airlines, because they depend so heavily upon the actions of many individual employees for safe operations, must create an "atmosphere of confidence and trust" in order to obtain "frank and complete disclosure of facts" to maintain operational safety and avoid accidents. Airline employees, whether they are investigating an accident, a routine operational procedure, or being interviewed about areas of safety that have attracted the interest of airline management, must be free of the fear that their words and thoughts will be used against the company or themselves in litigation at a later date. Without the privilege, both investigators and interviewees cannot be expected to commit to paper "minor" problems or deficiencies before they become "major" ones, thus depriving airline managements of vital safety-related information and the opportunity to address potential safety issues early and efficiently. Not having this kind of information flow available has been referred to as a "dual chilling effect" because not only does disclosure discourage airlines and their safety personnel from investigating and documenting discrepancies, but also because individual employees may be less willing to come forward with candid information. *See* Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1091-93 (1983) ("Harvard Note"). The same dilemma led the Court to reject the "control group test" of privilege in *Upjohn*.

2. Maintaining and improving aviation safety is clearly a "transcendent public good."

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[6] The ultimate balancing of interests for applying self-critical analysis in the context of aviation safety is closely analogous to the balancing of interests with respect to the psychotherapist privilege in *Jaffee*. This interpretation would in no way be inconsistent with *University of Pa. v. EEOC*, 493 U.S. 182 (1990), where the crux of the Court's decision not to recognize a new privilege protecting academic peer review was based on the fact that the public benefit of creating such a privilege was outweighed by the "great, if not compelling, governmental interest" in "ferreting out" invidious discrimination. *Id.* at 193.

3. In the context of aviation accident litigation, the only reason to discover self-critical analysis is the pursuit of punitive damages because liability is not generally an issue. Punitive damages have never been sustained in such a context. The value of producing such self-critical documents, even assuming they show procedural anomalies, is minimal in comparison with the chilling effect on airline employees discussed above. In *Upjohn*, the Court allayed concerns about burdening discovery by distinguishing between actual facts an employee would have to disclose and the privileged communications. *Upjohn*, 449 U.S. at 395-96. Similarly, the self-critical analysis privilege does not hinder discovery of particular facts or access to individuals but protects those documents or meetings relating to safety evaluation and potential areas for change to procedures. *See Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 521-22 (E.D. Tenn. 1977) (strictly limiting scope of questioning regarding aircraft manufacturer's list of problem products and prohibiting any discovery relating to meetings designed to "review, analyze, and evaluate operation for continued self-improvement" of products).

4. While application of the self-critical analysis privilege to airline safety audits and investigations is apparently an issue of first impression, both the courts and federal and state legislatures have supported the privilege in analogous safety fields. *See, e.g., ASARCO, Inc. v. NLRB*, 805 F.2d 194, 199-200 (6th Cir. 1986); *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 131-33 (5th Cir. 1968). In addition, virtually every state has adopted the privilege for "medical review boards", another "public safety" area. *See* 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5431, 428-442 (Supp. 1996) (summarizing the statutory "medical review" privileges state by state). These privileges are largely synonymous with and have the same origin as the self-critical analysis privilege. *See Bredice v.*

Doctors Hospital Inc., 50 F.R.D. 249, 250-51 (D.C. Cir. 1970), *aff'd without opinion*, 479 F.2d 920 (D.C.Cir. 1973).[7]

By failing to apply the standards enunciated in *Jaffee* to this case, the court below also failed to follow this Court's clear intent to shield documents meeting the criteria set forth in *Jaffee*.

B. The Failure of the Court Below to Follow *Jaffee* Adds to the Confusion in the Lower Courts About the Scope and Application of the Self-Critical Analysis Privilege

The tests enunciated by various circuits and by numerous district courts has led to a patchwork of rules ill-defining the scope and application of the self-critical analysis privilege. As a result, the courts themselves recognize that they are in disarray.[8]

The federal courts of appeals have either enunciated differing rules of application or declined to rule at all. Thus, in the Fifth Circuit, companies may protect "full and candid evaluations of the cause of accidents . . ." *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 131 (5th Cir. 1968), but in the Ninth Circuit, a similar report may not be shielded *See Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 427 (9th Cir. 1992) ("routine pre-accident

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[7] Support for applying the self-critical analysis privilege in aviation can be found in Federal law regulating air transportation. *See infra* Part III. *Cf. In re United States*, 864 F.2d 1153 (5th Cir. 1989) (granting mandamus to protect from disclosure medical quality assurance records in accordance with 10 U.S.C. § 1102); 38 U.S.C. § 5705(a) (codifying the protected status of quality assurance programs within the Veteran's Administration hospital system).

[8] *See In re Grand Jury Proceedings*, 861 F. Supp. 386, 387 (D. Md. 1994) (noting that "[t]he Supreme Court and the circuit courts have neither definitively denied the existence of [the self-critical analysis] . . . privilege, nor accepted it and defined its scope"); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 305 (N.D. Ill. 1993) (remarking on "inconsistencies in the district court opinions and the Supreme Courts' failure to [explicitly] recognize the [self-critical analysis] privilege . . ."); Busch, Comment, *supra*, at 607-12 (discussing the inconsistent application of the privilege).

safety reviews are not protected . . ."). In the D.C. Circuit, the privilege may be applied in cases involving public health or safety, *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 467 n.1 (D.C. Cir. 1994) (noting that the self-critical analysis privilege "has been found only in limited cases involving areas of public health . . . or public safety"); whereas the Sixth Circuit focused on the requestor. *FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980) (holding that the self-evaluative privilege does not apply where documents are sought by or subpoenaed by government agencies); and the Fourth Circuit in one case focused on whether the reports were prepared for "internal use" only. *See Reynolds Metals Co. v. Rumsfield*, 564 F.2d 663, 667 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978).

The *Dowling* case, the latest circuit court decision to address the self-critical analysis privilege in depth, adopted a three-prong test enunciated in a 1983 Harvard Law Review article,[9] but also considered the voluntary or involuntary nature of disclosures, the intended use of the documents, and whether the documents were generated prior to or following an accident. *Dowling*, 971 F.2d at 425-27. Even in *Dowling*, however, the court wavered about whether it was fair to mandate production of documents the litigant was required by the government to prepare. *Id.* at 426-27.

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[9] Harvard Note, *supra*, at 1086 (drawing these three criteria from then-existing case law). The three prongs are:

> First, the information must result from a critical self-analysis undertaken by the party seeking protection; Second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.

Id. *See also Brem v. Decarlo*, 162 F.R.D. 94, 101 (D. Md. 1995); *Etienne v. Mitre Corp.*, 146 F.R.D. 145, 147 (E.D. Va. 1993); *Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507, 509 (E.D. Pa. 1987) (under state law privilege). *See also Warren v. Legg Mason Wood Walker, Inc.*, 896 F. Supp. 540, 541 (E.D.N.C. 1995) (stating similar criteria to the test enunciated in *Brem*).

Other courts have added to, modified, or ignored the three prong self-critical analysis test discussed above, focusing *inter alia* on: (1) distinctions between subjective and objective factual information in documents sought to be protected[10]; (2) finding post-accident investigations warrant more protection than pre-accident safety reviews[11]; (3) the voluntary or involuntary nature of disclosure to the government[12]; (4) whether the government is the party seeking the information;[13] and the type of data sought to be protected.[14]

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[10] *See O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965).

[11] *See United States ex rel Falsetti v. Southern Bell Tel. & Tel. Co.*, 915 F. Supp. 308 (N.D. Fla. 1996) (distinguishing *Dowling* where a pre-accident safety review was not within the privilege from *Reichold Chem., Inc. v. Textron*, 157 F.R.D. 522 (N.D. Fla. 1994) where a retrospective self-assessment of environmental damage was privileged). In the aviation context, the notion that pre-accident evaluations are not as protected as post-accident evaluations is equivalent to saying airlines should not attempt to improve safety before an accident.

[12] *Compare Dowling*, 971 F.2d at 426-27 (noting "It may be unfair for a court to require a party to turn over to an opposing litigant self-damning assessments that the government has required it to prepare.") *with Etienne v. Mitre Corp.* 146 F.R.D. 145, 148 (E.D. Va. 1993) ("Because such reports and studies are produced involuntarily, there is no reasonable expectation . . . that such material will remain confidential."). *Cf.* FAA Advisory Circular (AC) 120-56 (Appendix D to USAir's Petition) (exempting records voluntarily submitted to the FAA from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4)). *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235 (E.D. Mo. 1996) (holding that internal adverse impact analysis studies voluntarily turned over to the EEOC at EEOC's request could not be disclosed by the EEOC).

[13] *See, e.g., FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980) (holding that the self-evaluative privilege does not apply where documents are sought by or subpoenaed by government agencies); *In re Grand Jury Proceedings*, 861 F. Supp. 386, 388 (D. Md. 1994).

[14] *See ASARCO, Inc. v. NLRB*, 805 F.2d 194, 199 (6th Cir. 1986) (protecting internal safety analysis containing opinions and recommendations but not pictures taken following accident); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D.

The court below has added to this confusion by concluding that the trial court did not abuse its discretion and by failing to give the trial court clear instructions to protect the disputed documents.

C. Protection of Airline Internal Safety Investigations from Disclosure is a Matter of Compelling Public Policy

The genesis of the self-critical analysis privilege lies in the areas of health and safety. Although *Bredice v. Doctors Hospital Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd without opinion*, 479 F.2d 920 (D.C. Cir. 1973), holding that "self analysis" by a medical review committee was privileged, is often considered the first enunciation of the self-critical analysis privilege, that case was predated by cases holding that documents prepared during accident investigations were privileged. *See Southern Ry. Co. v. Lanham*, 403 F.2d 119, 131 (5th Cir. 1968) (prohibiting discovery of portions of post-accident reports prepared by claims agents for the railroad, because: "[F]ear of discovery might deter [the railroad] from seeking full and candid evaluations of the cause of accidents and the proper disposition of claims"); *O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965); *Richards v. Maine Cent. R.R.*, 21 F.R.D. 590 (D. Me. 1957).

Since the 1970s, courts have found that the underlying balance of interests has weighed in favor of the self-critical analysis privilege where the information sought to be protected deals with health or safety issues. *See ASARCO, Inc. v. NLRB*, 805 F.2d 194, 199-200 (6th Cir. 1986) (holding privileged a "self-critical report" prepared by company after mining accident); *Reichhold Chem., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 526 (N.D. Fla. 1994) ("[t]he public interest in allowing individuals and corporations to candidly assess their compliance with

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518, 521-22 (E.D. Tenn. 1977) (differentiating between lists identifying problem products to which limited protection applied and actual minutes or records of internal safety meeeting that were fully privileged).

environmental regulations 'promotes sufficiently important interests to outweigh' the interest of opposing private litigants . . ."); *Bradley v. Melroe Co.*, 141 F.R.D. 1, 3 (D.D.C. 1992) ("[I]t is not realistic to expect candid expressions of opinion or suggested changes in policies, procedures, or processes knowing that such statements or suggestions may very well be used against colleagues and employees in subsequent litigation."); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 520-22 (E.D. Tenn. 1977) (prohibiting discovery related to self-improvement meetings held by aircraft manufacturer). In the health field, protection of medical review boards is well-recognized and has been codified in virtually every state. *Reichold*, 157 F.R.D. at 525.

The scope and application of the self-critical analysis privilege has raised debate in academic writings, with many commenters calling for clear guidance.[15] Further, the self-critical analysis privilege has been applied in many areas outside health and safety where the policy justifications for the privilege are considerably different. *See Banks v. Lockheed Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) (employment discrimination); *In re Crazy Eddie Security Litigation*, 792 F. Supp. 197, 205-06 (E.D.N.Y. 1992) (internal reviews of accounting procedures); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977) (academic peer review).

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[15] *See* Paul B. Taylor, *Encouraging Product Safety Testing by Applying the Privilege of Self-Critical Analysis When Punitive Damages are Sought*, 16 HARV. J.L. & PUB. POL'Y, 769 (1993); Busch, Comment, *supra*; John F.X. Peloso, *The Privilege for Self-Critical Analysis: Protecting the Public by Protecting the Confidentiality of Internal Investigations in the Securities Industry*, 18 SEC. REG. L.J. 229 (1990); David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113 (1988); Harvard Note, *supra*; *see also* William B. Johnson, *Annotation, Discoverability of Traffic Accident Reports and Derivative Information*, 84 A.L.R.4th 15, § 13 (1987) (discussing application of the self-critical analysis privilege to traffic accident reports).

As discussed in Part III, none of these latter applications is the product of a more compelling public policy than airline safety.[16]

II. AIRLINE INTERNAL SAFETY INVESTIGATIONS CLEARLY FALL WITHIN THE SCOPE OF THE SELF-CRITICAL ANALYSIS PRIVILEGE

The rationale for the application of the self-critical analysis privilege is strongest in the health and safety fields, including aviation safety. Self-critical analysis by airlines meets all of the criteria usually enunciated by the courts, including this Court in *Jaffee*.

A. Airline Internal Safety Investigations Are Conducted to Improve Airline Procedures and Products

Notwithstanding comprehensive safety oversight by the FAA, airlines are, of course, primarily responsible for aviation safety. Airlines use internal audits, reviews, and investigations, among various other means, to continuously improve not only the safety of individuals within the system but also the system itself, in addition to being encouraged by the highest levels of government, internal reviews and analyses are a function demanded by the highest levels of airline management to identify anomalies within the system. Self-critical analysis is sometimes performed by internal airline auditors and, sometimes, by outside consultants, but its objective is always the same: improved safety for the travelling public.

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[16] There is possibly one other industry that is as highly regulated as aviation - the nuclear power industry. The comprehensive regulatory schemes mandated by Congress for both of these industries is the result of Congress's concern for public health and safety. *Cf. Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (holding that information generated as part of a voluntary safety information sharing system and voluntarily disclosed to the Nuclear Regulatory Commission ("NRC") could not be disclosed by the NRC to third parties).

B. Airline Internal Safety Investigations are Intended to Remain Confidential to Preserve the Free Flow of Ideas

Because of the sensitivity of the information developed by internal safety investigations, airlines do not expect the results of their safety reviews to be published. Rather, the information, analysis, and recommendations developed during such reviews are used to improve an airline's safety performance, usually under the direction of a company-wide safety officer who reports directly to the company's president or chief executive officer. As noted below, even when an airline uncovers suspected violations of the FAA's regulations and communicates its findings to the FAA, the FAA considers the communication to be confidential information that cannot be disclosed under the Freedom of Information Act.[17]

C. Permitting Discovery of Airline Internal Safety Investigations Will Significantly Curtail the Flow of Information and Will Diminish Their Value

There is significant value in having the results of internal safety reviews in writing. Airlines are large organizations and formal communication of these analyses is essential if they are to be effective. Moreover, future generations of airline management need to be able to learn from their predecessors. However, if reports of airline internal audits and investigations were to be divulged in the context of law suits, where otherwise constructive ideas and recommendations may assume the aspect of hobgoblins coming back to haunt the airline, frank discussion of observations and incisive analysis of safety matters would come to a virtual end, at least in writing, much to the detriment of airline programs intended to improve safety.

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[17] *See* FAA Advisory Circular (AC) 120-56 (Appendix D to USAir's Petition) (exempting records voluntarily submitted to the FAA from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4)).

The issue before the Court should not be confused with questions of liability or the availability of monetary awards in aviation accidents. Airlines already have strong incentives, including (but certainly not limited to) judicially-awarded damages and the potential of FAA certificate action and penalty proceedings, to conduct the safest possible operations. When put in the context of the airline industry, withholding self-critical documents, whether generated by the airline or by an outside consultant, is not an attempt to deprive plaintiffs of information, but rather an attempt to further overriding statutory and public policy goals that should and must supersede individual goals. Forcing disclosure of internal safety documents will hinder, not advance, that public policy goal and, ultimately, the safety of the air transportation system.

This Court should recognize that compelling public policy considerations dictate that such information should not be disclosed in this litigation, especially since the factual data underlying an airline's analysis can be obtained elsewhere, can be analyzed by plaintiffs' experts, and can form the basis of those experts' opinions.

III. BOTH CONGRESS AND THE FAA INTENDED TO INSULATE SAFETY-RELATED INFORMATION FROM LITIGATION

A. Congress Mandated the Protection of Aviation Safety-Related Information

Airline safety is one of the most heavily-regulated endeavors in the nation. The Department of Transportation (DOT) is directed by statute to consider "maintaining safety as the highest priority in air commerce" even when addressing economic decisions, 49 U.S.C. § 40101(a)(1). The FAA, the agency with primary jurisdiction over airline safety, is obliged to regulate airlines "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. § 44701(c). And, as noted above, airlines have a *duty* to operate

with the "highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d).

A clear example in aviation that the lack of protection chills free and frank discussion of safety issues arises in the context of the reluctance of airlines to share information relating to past performance of pilots with other airlines.[18] As a result, Congress is considering several bills, such as H.R. 3536, 104th Cong. 2d. Sess. (1996), the "Airline Pilot Hiring and Safety Act," and Title VII of the "Federal Aviation Administration Authorization Act of 1996," S.1994, 104th Cong. 2d. Sess. (1996), to discourage suits and encourage sharing of pilot information between airlines.

Similarly, in establishing the NTSB, the independent agency charged with investigating aviation tragedies such as the one that is the subject of this litigation, the Congress anticipated that litigants might wish to use the NTSB's analysis, findings, and recommendations for purposes that were not safety-related. Accordingly, the Congress provided that:

> No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence *or used* in a civil action for damages resulting from a matter mentioned in the report.

49 U.S.C. § 1154(b) (emphasis added). There are even more stringent restrictions on the discovery and use of cockpit voice recorder tapes and transcripts in litigation. *See* 49 U.S.C. § 1154(a). The House of Representatives recently passed H.R. 3159, 104th Cong. 2d. Sess. (1996), that would prohibit any agency from disclosing safety-related information voluntarily submitted to the NTSB in order to specifically encourage sharing of safety data by airlines. *See National Transportation Safety*

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[18] Following a 1994 accident, the NTSB recommended that the FAA require airlines to share pilot training and performance information, with due consideration to privacy concerns.

Board Reauthorization: Joint Hearings before the Subcomm. on Aviation, Subcomm. on Railroads of the House Comm. on Trans. and Infrastructure, 104th Cong., 2d. Sess. 39, 50 (1996) (Statement of Jim Hall, Chairman NTSB) ("This proposed amendment would cure private sector concern and permit agency access to information not now readily available to it.")

Although Congress left the specifics of aviation safety oversight to the FAA, Congressional policy is clear, consistent, and contrary to the use of safety-related investigative materials in litigation arising out of aviation accidents. This Court should do no less.

B. The FAA Strongly Encourages Internal Safety Audits and Reviews

Government regulators cannot monitor every flight or look over every employee's shoulder, a fact that is recognized both by the FAA and the airlines. For example, with FAA support the aviation industry is planning to share safety data with a test-bed Flight Operations Quality Assurance program. As the Chairman of the Flight Safety Foundation states:

> We believe strongly that nonpunitive safety-data programs are excellent accident-prevention tools . . . . But we must assure the industry that these data will remain confidential and will not be used in legal actions, and that individual privacy will be protected. . . . . Confidentiality, data security and the potential for punitive and legal actions are among the industry's top concerns in establishing a widespread data exchange.

Flight Safety Foundation, News, *FSF Chairs Aviation Industry Data-sharing Task Force*, Feb. 13, 1996.

The FAA, in proposing to implement a Global Analysis and Information Network (GAIN) to encourage sharing of safety data has also recognized the need for "adequate safeguards . . . to

protect the security and confidentiality concerns of the information providers . . . ." A Call for the Development of Prototype(s) for a Global Analysis and Information Network (GAIN), 61 Fed. Reg. 21522, 21523-524 (1996). The FAA gives several examples of how effective data-sharing arrangements in other countries solved critical safety problems before accidents occurred.[19]

The FAA encourages airlines to perform internal safety audits and reviews, to improve their safety and systems as a result of their internal findings, and to report any suspected lapses to the FAA without jeopardy of FAA enforcement action, imposition of civil penalties, or disclosure to third parties under the Freedom of Information Act, 5 U.S.C. § 552, because disclosure of such reports would both:

> (1) impair the Government's ability to collect similar information in the future, and (2) cause harm to an "identifiable" governmental interest.

FAA Advisory Circular (AC) 120-56, p. 7. While AC 120-56 applies, by its terms, only to suspected instances in which an airline may not have complied with the FAA's regulations, the principle stated in the Advisory Circular (as well as in a similar Advisory Circular directed to the aviation manufacturing community and in policy statements by the U.S. Secretary of Transportation and the FAA Administrator) is crystal clear: There is an overriding governmental interest in airlines' engaging in internal investigations of their safety performance without the threat of punishment by the FAA or discovery by third parties for use in litigation.

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[19] For example, data analysis found that an airline's pilots were frequently disregarding ground proximity warnings due to a high false alarm rate and led to software fixes to reduce false alarms. *Id.* at 21524. Data analysis also disclosed that a particular type of aircraft was developing cracks due to hard landings where no post-landing inspections were required, leading to mandatory inspections following such landings. *Id.*

Allowing the court below to compel disclosure of airline internal safety analyses is directly contrary to a strong public policy expressed by Congress in adopting the comprehensive aviation safety regulatory scheme of the transportation laws and is directly contrary to the implementation of those laws by the agency designated by Congress to establish such policies. This Court should adopt the good judgment of the federal agency with primary jurisdiction over airline safety, the FAA, and refuse to allow the court below to compel disclosure of the documents sought by plaintiffs.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant USAir's Petition for a Writ of Prohibition.

Respectfully submitted,

LOUISE B. COBBS*
HAIGHT, GARDNER, POOR & HAVENS
2000 Pennsylvania Ave., NW, Suite 4400
Washington, DC 20006-1812
(202) 496-2700

* Counsel of Record for *Amicus Curiae*
Air Transport Association of America

APPENDIX A

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

(b) This section does not apply to matters that are -

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * * *

10 U.S.C. § 1102. Confidentiality of medical quality assurance records: qualified immunity for participants

(a) Confidentiality of records. Medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. Such records may not be disclosed to any person or entity, except as provided in subsection (c).

(b) Prohibition on disclosure and testimony.

(1) No part of any medical quality assurance record described in subsection (a) may be subject to discovery or admitted into evidence in any judicial or administrative proceeding, except as provided in subsection (c).

(2) A person who reviews or creates medical quality assurance records for the Department of Defense or who participates in any proceeding that reviews or creates such records may not be permitted or required to testify in any judicial or administrative proceeding with respect to such records or with respect to any finding, recommendation, evaluation, opinion, or action taken by

such person or body in connection with such records except as provided in this section.

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38 U.S.C. § 5705. Confidentiality of medical quality assurance records

(a) Records and documents created by the Department as part of a medical quality assurance program (other than reports submitted pursuant to section 7311(g) of this title) are confidential and privileged and may not be disclosed to any person or entity except as provided in subsection (b) of this section.

* * * * * *

49 U.S.C. § 1154. Discovery and use of cockpit voice and other material

(a) Transcripts and recordings.

(1) Except as provided by this subsection, a party in a judicial proceeding may not use discovery to obtain -

(A) any part of a cockpit voice recorder transcript that the National Transportation Safety Board has not made available to the public under section 1114(c) of this title; and

(B) a cockpit voice recorder recording.

(2) (A) Except as provided in paragraph (4)(A) of this subsection, a court may allow discovery by a party of a cockpit voice recorder transcript if, after an in camera review of the transcript, the court decides that -

(i) the part of the transcript made available to the public under section 1114(c) of this title does not provide the party with sufficient information for the party to receive a fair trial; and

(ii) discovery of additional parts of the transcript is necessary to provide the party with sufficient information for the party to receive a fair trial.

(B) A court may allow discovery, or require production for an in camera review, of a cockpit voice recorder transcript that the Board has not made available under section 1114(c) of this title only if the cockpit voice recorder recording is not available.

(3) Except as provided in paragraph (4)(A) of this subsection, a court may allow discovery by a party of a cockpit voice recorder recording if, after an in camera review of the recording, the court decides that -

(A) the parts of the transcript made available to the public under section 1114(c) of this title and to the party through discovery under paragraph (2) of this subsection do not provide the party with sufficient information for the party to receive a fair trial; and

(B) discovery of the cockpit voice recorder recording is necessary to provide the party with sufficient information for the party to receive a fair trial.

(4) (A) When a court allows discovery in a judicial proceeding of a part of a cockpit voice recorder transcript not made available to the public under section 1114(c) of this title or a cockpit voice recorder recording, the court shall issue a protective order -

(i) to limit the use of the part of the transcript or the recording to the judicial proceeding; and

(ii) to prohibit dissemination of the part of the transcript or the recording to any person that does not need access to the part of the transcript or the recording for the proceeding.

(B) A court may allow a part of a cockpit voice recorder transcript not made available to the public under section 1114(c) of this title or a cockpit voice recorder recording to be admitted into evidence in a judicial proceeding, only if the court places the part of the transcript or the recording under seal to prevent the use of the part of the transcript or the recording for purposes other than for the proceeding.

(5) This subsection does not prevent the Board from referring at any time to cockpit voice recorder information in making safety recommendations.

(b) Reports.

No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

49 U.S.C. § 40101. Policy

(a) Economic regulation.--In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(1) assigning and maintaining safety as the highest priority in air commerce.

* * * * * *

49 U.S.C. § 44701. General requirements

(c) Reducing and eliminating accidents. The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards. --When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall--

(1) Consider--

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.

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